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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Secretary of Interior exceeded his authority under § 402(a) of the Surface Mining Control and Reclamation Act of 1977, (SMCRA), 30 U.S.C. § 1232(a) (1982), which authorizes the imposition of reclamation fees on each "ton of coal produced," by interpreting "coal" to include, among other things, water that is not an inherent part of "coal."

2. Whether the Court of Appeals' conclusion that Congress had no specific intent with respect to the meaning of "coal" as that term is used in SMCRA, and its deference to the Department of Interior's expansive interpretation of that term, were correct in light of the readily discernable ordinary meaning of the word coal, and legislative history reinforcing a construction that accords with such ordinary meaning.

PARTIES TO THE PROCEEDINGS

Drummond Company, Inc., the petitioner herein, filed this action in the United States District Court for the District of Columbia. When the District Court issued its decision and an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, the National Coal Association and the Mining and Reclamation Council of America filed briefs *amicus curiae* in support of Drummond Company, Inc.'s appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Drummond Company, Inc.* respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 22, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in *Drummond Coal Company v. Hodel*, No. 85-5827 (D.C. Cir. July 22, 1986), is reported at 796 F.2d 503 (D.C. Cir. 1986). App. 1a-11a. The opinion of the District Court, which

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* Drummond Company, Inc., the successor to Drummond Coal Company, is a privately-owned corporation. All of its subsidiaries are wholly-owned.

was affirmed by the Court of Appeals, is reported at 610 F. Supp. 1489 (D.D.C. 1985). App. 12a-42a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1986. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on September 26, 1986, and this petition for certiorari is filed within 90 days of that date. App. 43a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are at issue in this case, and are set forth in the Appendix:

1. Surface Mining Reclamation and Control Act of 1977, §§ 401, 402, 30 U.S.C. §§ 1231, 1232 (1982), App. 117a-122a.

2. 42 Fed. Reg. 62715 (1977), 30 C.F.R. § 837.12, App. 129a-137a (initial reclamation fee regulations).

3. 30 C.F.R. § 700.5 (1986), App. 124a-128a (definitional provisions).

4. 30 C.F.R. § 870.12 (1986), App. 123a (current reclamation fee regulations).

STATEMENT OF THE CASE

1. Statutory Framework

One of the principal purposes of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) was to promote the reclamation of areas that were adversely affected by surface coal mining operations, while striking a "balance between protection of the environment . . . and the Nation's need for coal." 30 U.S.C. § 1202 (a), (f), (h). With that objective in mind, Congress established the Abandoned Mine Reclamation Fund (Fund)

to provide the financial base needed to reclaim and restore land and water resources in areas in which coal mining activities had ceased. 30 U.S.C. §§ 1231(c)(1), 1233. The Fund is subsidized primarily by means of reclamation fees levied upon coal mining operators throughout the United States. 30 U.S.C. § 1231(b)(1).

The amount of reclamation fees owed by each coal mining operator responsible for making payments to the Fund is determined by the weight of coal mined. With respect to surface coal mining, § 402 of the statute provides that the operator must contribute to the Fund on a quarterly basis "a reclamation fee of 35 cents per ton of coal produced. . . ." 30 U.S.C. § 1232(a).[1]

Congress arrived at this method for calculating reclamation fees after much deliberation over how to control the environmental consequences of coal mining without affecting adversely the ability of the coal industry to meet the nation's energy requirements. 30 U.S.C. §§ 1201, 1202. Congress was particularly concerned that the reclamation fee and other provisions of SMCRA not be implemented so as to impose an undue burden on the coal industry, or to cause inflation in the economy. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669. Congress' analysis of the costs associated with payment of reclamation fees by the coal industry was predicated on the assumption, not articulated in the text of the statute but nevertheless apparent from the House Report on the final bill,[2] that the substance to be taxed was in fact combustible coal and not extraneous materials found with it or absorbed by it during or after mining.

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[1] In contrast, the reclamation fee for coal produced by underground mining is 15 cents per ton, or 10 percent (10%) of the value of the coal at the time, whichever is less. 30 U.S.C. § 1232(a).

[2] *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, 149, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669, 681.

The issue here—whether such extraneous materials, specifically in this case water, should be included in the weight of coal for purposes of calculating reclamation fees under SMCRA—has arisen as a consequence of the practical realities of surface coal mining. When coal is removed from the ground, rock, clay, dirt, and other debris are frequently attached to or mixed with it. These impurities add weight to the total tonnage of mined material, but add nothing to the value of the commodity that the operator eventually sells. Such impurities can be removed from the coal only through expensive measures such as coal washing, which many small and midsize coal operators simply cannot afford.

Even after the coal and noncoal materials are extracted from the ground, their total weight may be increased by the weight of water absorbed by the coal when it is exposed to rain, or to water in the mine or pit, or to water during the washing process in a coal preparation plant. Coal operators distinguish this water, or "excess moisture", that may be added to coal after extraction from the inherent moisture content found in coal in its natural state.

2. Regulatory History

SMCRA vests the responsibility for administering the reclamation fee program in the Secretary of Interior (the Secretary). 30 U.S.C. § 1232(a). Acting through the Interior Department's Office of Surface Mining (OSM), the Secretary first promulgated regulations governing the collection of reclamation fees on December 13, 1977.[3] 30 C.F.R. Part 837, 42 Fed. Reg. 62713 (1977). The only provision of those regulations dealing with the issue of calculating reclamation fees under § 402(a) provided in pertinent part as follows:

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[3] These rules were incorporated without revision into permanent surface mining regulations issued by the Secretary on October 25, 1978. 30 C.F.R. § 870.12(b), 43 Fed. Reg. 49940 (1978).

> The [reclamation] fee shall be determined by the weight and value [of the coal] at the time of initial bona fide sale, transfer of ownership or use by the operator.

42 Fed. Reg. 62715 (1977), App. 132(a).

The Secretary's initial regulations did not prescribe any particular method for determining the weight and value of coal subject to payment of reclamation fees. The regulations did, however, set forth a definition of coal that has remained unchanged in the Secretary's current regulations:

> *Coal* means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above.

30 C.F.R. § 700.5 (1986), App. 124a (emphasis in original).[4]

Following promulgation of the Secretary's regulations, Drummond and other coal operators in Alabama did not include the weight of excess moisture in calculating the weight of coal subject to reclamation fees at the time of each initial sale.[5] They determined the weight of excess moisture by first identifying the moisture content of a sample of a particular coal shipment (*e.g.*, 6.9%); subtracting from that figure the percentage (2.88%) of the gross weight used by the State of Alabama as the

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[4] The American Society of Testing and Materials standard referred to in the above-quoted portion of the Secretary's regulations classifies coal by rank and sets forth test methods for classifying coals. By describing "moist" coal only as "inclusive of its natural complement of inherent or bed moisture," the standard plainly does not consider excess moisture as an element of "coal". Standard Specification for Classification of Coals by Rank, ASTM 388-77 at 2.

[5] Very rarely is all the coal delivered under a contract actually weighed. Rather, either the buyer or seller (or both) weigh a sample railcar or truckload of coal. The contract may call for a certain BTU (or heat equivalent) value per ton, and the price per ton often will vary depending on the BTU value.

standard inherent moisture content of coal located within that state; and deducting the resulting percentage (*e.g.*, 4.02%) from the gross weight of the mined coal, which constituted the excess moisture deduction.

Drummond and other Alabama coal operators reasoned that water added to coal after severance from the ground should not be counted as "coal" for purposes of the reclamation fees imposed by SMCRA.[6] This interpretation of the initial reclamation fee regulations was never disapproved by OSM.[7] In fact, it is clear from the record that prior to June 30, 1982, when the revised regulations at issue in this case were promulgated, the practice of the OSM regional officials responsible for implementing the Secretary's 1978 regulations was routinely to allow excess moisture deductions when a coal operator claimed them.[8]

On December 11, 1981, OSM proposed revisions to the abandoned mine land reclamation program, including changes to its § 402 fee regulations. 46 Fed. Reg. 60778

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[6] Drummond and other Alabama coal operators followed the same practice, which was authorized by state law, in determining their Alabama severance taxes.

[7] Although the record does not document the full extent of excess moisture deductions taken by coal operators outside of Alabama prior to 1982, coal operators throughout the country were certainly aware of the issue and it is reasonable to presume that a number of others took advantage of such deductions. Unless this practice had been brought specifically to the attention of OSM, however, as it was in the case of Drummond when it neglected to take the deduction for one reporting period and sought a refund, the Secretary would, in the absence of an audit of a coal company's § 402 fee reports, generally not have knowledge of such deductions.

[8] For example, an OSM memorandum indicated that excess moisture deductions "would not be questioned" in part because of the OSM regional official's "perception of an extremely slim possibility that the Government could prevail in a court effort to prove that water was in fact coal. . . ." App. 139a. Another OSM document referred to estimates "that approximately 70 percent of the tonnage reported by operators in the State [of Alabama] includes an adjustment for excess moisture." App. 144a.

(1981). The revised fee regulations, which were ultimately promulgated in final form on June 30, 1982, state in relevant part:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> . . . .
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

47 Fed. Reg. 28574 (1982), codified at 30 C.F.R. § 870.12 (b)(3)(i) (1986) (emphasis in original), App. 123a.

In the preamble to its 1981 proposed revisions, OSM explained that the intent of the change in its reclamation fee regulations was "to allow fees to be based on coal to be sold, and to prevent any deduction for impurities that have not been removed." 46 Fed. Reg. at 60781, col. 1 (1981). In promulgating his final regulations, the Secretary did not address the fundamental legal issue of whether he possessed the authority under SMCRA to treat excess moisture or other impurities as coal for purposes of the § 402(a) tax. Instead, he merely restated the assertions in the notice of proposed rulemaking that the revisions were intended as a clarification, and that excluding excess moisture would be "contrary to the established policy and the intent of the clarifying rule." 47 Fed. Reg. at 28578, col. 1 (1982).[9]

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[9] The only explanation for the new excess moisture policy offered by the Secretary was that without it (a) audits of operator records would become more complicated, (b) fee collections could be re-

3. The District Court Decision

On August 27, 1982, Drummond filed an action for declaratory and injunctive relief in the United States District Court for the Northern District of Alabama under 30 U.S.C. § 1276(a)(1) seeking to have the Secretary's June 30, 1982 revised regulations set aside. Because of uncertainty as to which court had jurisdiction, Drummond simultaneously filed an identical action as a protective measure under 30 U.S.C. § 1276(a)(1) in the United States District Court for the District of Columbia. Shortly after Drummond's complaints were filed, the Secretary filed a motion in the Northern District of Alabama to dismiss or transfer the Alabama case on the grounds that SMCRA provided for exclusive jurisdiction in the District of Columbia. After that motion was denied, Drummond requested and was granted a stay of the District of Columbia action pending the outcome of the Alabama suit.

On May 18, 1983, the United States District Court for the Northern District of Alabama ruled that it had jurisdiction and that the 1982 revised reclamation fee regulations were valid. *Drummond Coal Company v. Watt*, Civil No. CV82-H-1838-S (N.D. Ala., May 18, 1983), App. 44a-50a. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and vacated the Alabama district court decision on the ground that § 1276(a)(1) of SMCRA "vests in the United States District Court for the District of Columbia exclusive jurisdiction over th[e] case." *Drummond Coal Company v. Watt*, 735 F.2d 469, 470 (11th Cir. 1984), App. 51a-64a. With the Alabama litigation vacated, the district court below lifted its stay and on cross-motions for summary judg-

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duced, and (c) allowing operators to deduct moisture where a state permitted such deductions would "be inconsistent with requirements for uniform application of Part 870 and equitable treatment of all operators." *Id.* The Secretary made no attempt to explain why a rule allowing deductions of excess moisture could not have been uniformly applied to all operators.

ment ruled in favor of the Secretary. *Drummond Coal Company v. Hodel*, 610 F. Supp. 1489 (D.D.C. 1985), App. 12a-42a.

The district court viewed the remedial purposes of SMCRA as central to its analysis of the lawfulness of the revised regulations, and gave great deference to OSM in carrying out these purposes. Although the district court acknowledged Drummond's primary argument that SMCRA authorizes the assessment of fees only on coal, and that excess moisture is not coal, the court never directly addressed that issue because it believed that "the definition of 'coal' is irrelevant to the question at issue here." App. 36a. Instead, the court claimed that it only need decide whether the Secretary's decision to assess the reclamation fees based on weight at a given time was reasonable. At the same time, however, the court made clear its view that the reference to coal "produced" in § 402 precluded any meaningful effort to discern congressional intent underlying use of the term "coal." App. 25a-26a.

The court suggested that there were two alternative interpretations of the term "produced"—"produced" meaning "solely the process of extraction" and "produced" meaning "the entire process of extracting and selling coal, complete from pit to buyer's door." App. 25a-26a. The court determined that either approach would be consistent with the Act. App. 25a. And it concluded that the Secretary's choice of the latter interpretation was reasonable since it was "not inconsistent with the plain language of the statute." App. 28a.[10]

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[10] The district court also found that the revised regulations did not represent a policy change at the national level. App. 37a. Instead, it stated that lack of a consistent administrative practice argues for the conclusion that "OSM had no real policy" prior to 1982. To the extent that there was a change of policy, the court found that the Secretary acted reasonably. App. 41a.

4. The D.C. Circuit's Decision

The D.C. Circuit upheld the district court's interpretation of the language and legislative history of SMCRA. First, the court found the statutory term "coal produced" to be ambiguous. According to the court, that ambiguity was largely due to the fact that Congress did not define the terms "coal" or "coal produced" in the statute. App. 5a. In the court of appeal's view, further ambiguity was introduced by Congress' reference to coal "produced" because coal "production" could reasonably be interpreted to refer to the initial point of extraction before excess moisture became associated with coal, or to the point at which the coal was sold containing excess moisture. App. 5a-6a.[11] Without ever discussing the ordinary meaning of "coal" or "coal produced," the court of appeals claimed it was unable to come to any conclusions regarding the legislative intent underlying Congress' use of those words in § 402 of SMCRA. App. 5a-6a.

In view of what it found to be the ambiguity of the statutory language, the court stated that it was bound by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Secretary's interpretation, unless the legislative history specifically disclosed congressional intent on the question at issue. App. 6a. But the court concluded that "Congress in fact never addressed the particular issue that we confront in this case." App. 7a. The only guidance that the D.C. Circuit could extract from congressional deliberations on SMCRA was a general policy concern "with the burden placed on the [coal] industry and consumers and with the inflationary impact of the fee." App. 7a.

In reaching this conclusion, the court below expressly rejected the views of the Third Circuit in *United States*

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[11] At the same time, the court speculated, without any basis in the record for doing so, that the "prevailing industry practice" between 1977 and 1982 was to interpret the phrase "coal produced" to include extraneous materials such as excess moisture. App. 6a.

v. Brook Contracting Corp., 759 F.2d 320 (3rd Cir. 1985), a case in which the precise reclamation fee regulations at issue here were invalidated.

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue of national importance. As the *amici* briefs that will be submitted in support of this petition by the two major associations of coal companies attest,[12] whether "coal" includes excess moisture is an issue that has a profound effect on the financial obligations of every coal operator in the United States under the reclamation fee program of SMCRA. In fiscal year 1985 alone, the Secretary of Interior collected over $226 million in reclamation fees from coal operators throughout the country. Millions of dollars of these fees were paid by coal operators on noncoal materials such as excess moisture which, under the Secretary's revised regulations, cannot be deducted from the weight of coal unless they are physically removed from it. When one considers that the Secretary has collected over a billion dollars in reclamation fees over the last decade, it is apparent that the Secretary's prohibition against excluding excess moisture and other noncoal material from calculations of § 402(a) fees costs coal companies millions of dollars each year. The Secretary's statutory authority to impose such a prohibition is, therefore, an issue that has an enormous practical effect on the economic health and survival of the American coal industry.

Moreover, the question whether the term "coal" includes excess moisture has been a recurring one not only under the reclamation fee program, but also under the black lung tax program administered by the Internal

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[12] The National Coal Association and the Mining and Reclamation Council of America, together representing more than 400 coal companies, filed *amici* briefs in the court of appeals below, and will be filing *amici* briefs urging this Court to grant Drummond's petition.

Revenue Service and the United Mine Workers of America pension fund program into which many coal operators are required to make payments. In each of those contexts, the question whether "coal" should include excess moisture involves millions of dollars to the coal industry, and has repeatedly arisen in litigation. Any answer that the Court may give to that question in the context of § 402 of SMCRA would unquestionably have a dramatic impact on resolution of this issue in these other settings.

This case also presents an issue on which there is a clear and unequivocal split in the circuits. While the D.C. Circuit has upheld the Secretary's regulations, the Third Circuit, in *Brook Contracting*, held that they exceeded the scope of § 402(a) and were therefore invalid. In express contradiction to the Third Circuit's holding that § 402 does not authorize the Secretary to collect reclamation fees on the weight of "impurities", the D.C. Circuit ruled that the statute gave the Secretary the authority to tax "impurities", including excess moisture, as "coal." This split between two circuit courts on a fundamental question of statutory interpretation under SMCRA constitutes a compelling justification for granting this petition. Absent review by this Court, the extent of the Secretary's authority to collect reclamation fees will remain confused and unsettled. As it now stands, the Secretary's regulation cannot be uniformly enforced, and many coal operators, including Drummond, will be required to pay millions of dollars in reclamation fees that other operators, located in the Third Circuit and thus fortunate enough to claim the benefit of the *Brook Contracting* decision, will not have to pay. Against this background, resolution of the conflict between the circuit courts by this Court is essential to avoid disruption and inconsistent enforcement of the reclamation fee program, and to ensure the nationwide application of a single set of rules governing calculation of those fees.

Even in the absence of a conflict among the circuits, the decision below warrants review by this Court because it carries the statements of this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to an unwarranted and dangerous extreme. In *Chevron*, this Court admonished the lower courts that when reviewing agency action they are to "give effect to the unambiguously expressed intent of Congress," and to defer to an agency's reasonable construction of the statute "if the statute is silent or ambiguous with respect to the specific issue. . . ." 467 U.S. at 843.

The court below, however, has gone far beyond these directives by holding that the intent of Congress with respect to the meaning of a key statutory term cannot be discerned unless Congress explicitly defines that term in the text of the statute or in its legislative history. In reaching this conclusion, the D.C. Circuit abdicated its responsibility to apply common sense to the question before it and thus failed to consider the ordinary meaning of a key statutory term. It also failed to consider whether the general purposes of Congress in enacting SMCRA support the Secretary's expansive and counter-intuitive interpretation of the term "coal". The lower court's approach, if uncorrected, would inevitably lead to the evisceration of meaningful judicial review and to blind deference to agency interpretations, no matter how unreasonable, predicated on the "absence" of congressional intent. Accordingly, this Court's review of the decision below is needed to make clear that *Chevron* was not intended to lead reviewing courts down that path.

I. THE MEANING OF "COAL" IS A RECURRENT ISSUE OF NATIONAL IMPORTANCE

The question whether the Secretary has the authority to tax excess moisture and other noncoal materials as "coal" under § 402 of SMCRA is of critical importance to the coal industry. Each year, coal operators throughout the United States collectively pay hundreds of mil-

lions of dollars in reclamation fees. For example, as noted above, the Secretary in 1985 collected over $226 million in such fees.[13] While the portion of the annual reclamation fee payments attributable to the weight of excess moisture and other noncoal materials for which the Secretary's regulations prohibit deductions is not known, there can be no doubt that the § 402 fees paid annually on such materials amount to millions of dollars. Particularly for small or midsize coal companies which cannot afford to remove all excess moisture or other noncoal materials before weighing their coal, the economic harm imposed by the Secretary's regulations is severe. Thus, while the Secretary may have dismissed his 1982 revisions to reclamation fee regulations as a mere "clarification," the financial consequences of those regulations have been and will continue to be extremely burdensome to the coal industry.

Whether the word "coal" means what its plain English definition would suggest is vitally important in other contexts as well. That term also appears in the section of the Internal Revenue Code dealing with black lung taxes. *See* I.R.C. § 4121(a), (d). And this section of the code has given rise to litigation over the question whether "coal" includes excess moisture for purposes of calculating black lung taxes.

In *A.J. Taft Coal Co., Inc. v. United States*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985), the Eleventh Circuit relied on the plain meaning of the term "coal" in § 4121 of the Internal Revenue Code, in holding that the term simply did not encompass excess moisture. App. 91a. In contrast, the D.C. Circuit in this case ignored the plain meaning of "coal", and made clear its disagreement with the interpretation of the term adopted by the *Taft* court. App. 5a. This disagreement illustrates the extent to

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[13] 1985 Annual Report of the Office of Surface Mining Reclamation and Enforcement, p. 18.

which the meaning of "coal" has been the focal point of litigation whenever Congress has used the term.

Finally, the question of whether excess moisture associated with coal should be included in determining the weight of the coal has also arisen in the context of royalties paid by coal operators to union pension funds. The National Bituminous Coal Wage Agreement between the United Mine Workers Union and signatory coal companies requires employer contributions to pension trust funds based, in part, on the tonnage of coal produced. Coal operators in various states have taken deductions for excess moisture and other noncoal materials, and many of these deductions have been contested in court actions by fund trustees.[14] Whether "coal" should be interpreted in accordance with its plain meaning has been a central issue in this pension fund litigation.

II. REVIEW BY THIS COURT IS NEEDED TO RESOLVE A SPLIT BETWEEN THE CIRCUITS ON A FUNDAMENTAL QUESTION CONCERNING THE SCOPE OF THE SECRETARY'S AUTHORITY UNDER SMCRA

The D.C. Circuit's decision in this case creates a sharp conflict between two circuit courts. The court below held that the Secretary acted within the bounds of his authority under SMCRA when he revised the reclamation fee regulations to prohibit deductions of excess moisture and other noncoal materials in determining the weight of coal subject to payment of such fees. The Third Circuit, in contrast, ruled in *Brook Contracting* that the Secre-

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[14] *Compare A.J. Taft Coal Co., Inc. v. Connors*, No. CV86-H-245-S, slip op. (N.D. Ala. June 18, 1986), App. 105a-116a, and *Combs v. Sun-Up Coal Company, Inc.*, Civil No. V-80-P-0236-J, slip op. (N.D. Ala. September 3, 1980) App. 96a-104a, which permitted mine operators to take excess moisture deductions, *with Huge v. Ondesko*, 415 F. Supp. 816 (W.D. Pa. 1976), and *Lewis v. Kerns*, 175 F. Supp. 115 (S.D. Ind. 1959), which reached the opposite result.

tary exceeded the proper limits of his statutory authority in promulgating revised reclamation fee regulations that purported to tax noncoal materials. As a result of this conflict, § 870.12(b)(3)(i) of the Secretary's revised regulations has been upheld by the D.C. Circuit, but cannot be enforced against coal operators in jurisdictions covered by the Third Circuit.

The extent of the conflict before this Court extends far beyond the fact that a key component of the Secretary's revised reclamation fees regulations is valid and enforceable in the D.C. Circuit and perhaps other circuit courts, while at the same time is invalid and unenforceable in the Third Circuit as well as any others that choose to follow it. In its analysis of congressional intent discernible from Congress' use of the term "coal" in § 402 of SMCRA, the D.C. Circuit decision in this case stands in stark contrast to the Third Circuit's interpretation of "coal" in *Brook Contracting*. The court below found the term "coal" to be ambiguous because Congress did not provide a definition of that term in the statute itself. App. 5a. It made no attempt, as commonly accepted canons of statutory construction would dictate,[15] to ascertain from the ordinary meaning of the term "coal", the congressional intent underlying its use in § 402.[16]

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[15] *See, e.g., Russello v. United States*, 464 U.S. 16, 21 (1983).

[16] Indeed, as noted above, the Secretary's own definition of coal excludes such extraneous substances. The ordinary meaning of "coal" is stated clearly in its dictionary definition: coal is "a black or brownish black solid combustible mineral substance formed by the partial decomposition of vegetable matter without free access of air and under the influence of moisture and in many cases increased pressure and temperature, the substance being widely used as a natural fuel and containing carbon, hydrogen, oxygen, nitrogen, and sulfur as well as inorganic constituents that are left behind as ash after burning." *Webster's Third New International Dictionary* 432 (1976 ed.). A common sense reading of this definition suggests that extraneous substances, such as excess moisture, which are associated with coal only after its extraction from the ground,

The Secretary's attempt to implement a far more expansive interpretation of "coal" for purposes of determining the weight of material subject to reclamation fees is even more untenable in light of his own definition of the term in § 700.5 of his regulations. In that section ,"coal" is defined as "combustible carbonaceous rock classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77. . . ." App. 124a. While the imposition of reclamation fees on the weight of noncoal material was clearly inconsistent with this definition, the Secretary made no attempt to explain the basis or justification for the discrepancy.[17]

The D.C. Circuit's failure to rely upon or even address the ordinary meaning of the term "coal" cannot be reconciled with the common sense approach to the task of interpreting that term adopted by the Third Circuit in *Brook Contracting*. While the Third Circuit found the legislative history of SMCRA to be dispositive, it expressed its basic agreement with the straightforward and yet compelling proposition that "coal is coal and it means a material that is combustible." App. 66a.[18]

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and which do not qualify as a "solid combustible mineral substance," should not be considered to be "coal" for purposes of calculating reclamation fees.

[17] The D.C. Circuit believed that this discrepancy was justified because the definition of "coal" in § 700.5 was preceded by the phrase "except where otherwise indicated". App. 10a, 124a. But nowhere in the reclamation fee regulations does the Secretary "otherwise indicate" that "coal" should be interpreted one way for purposes of the reclamation fee regulations generally, and another way in the case of § 870.12(b)(3)(i) specifically. Even more important is the fact that the Secretary lacked the statutory authority to define "coal" in terms that were inconsistent with the ordinary meaning intended by Congress and reflected in § 700.5.

[18] In a different but clearly analogous context, the court in the *Taft* case concluded that in the absence of an expressly stated congressional intention to the contrary, it would respect the "plain meaning" of the term "coal" and construe it not to include excess

In *Brook Contracting*, the Secretary's 1982 regulations were challenged in an action brought by the Secretary to collect reclamation fees from two coal companies. The companies had calculated their reclamation fees on the basis of the weight of combustible coal only. The government, seeking to apply the 1982 regulations, contended that the companies were liable for additional fees assessed on the weight of rock, clay, dirt, and other material that was unearthed with coal during the mining process. App. 67a.

The Third Circuit rejected the government's contention and the interpretation of SMCRA on which it was predicated. Unlike the D.C. Circuit, the Third Circuit found the legislative history of SMCRA to be a revealing source of congressional intent on the question of whether the weight of noncoal materials should be included in reclamation fee calculations. Specifically, the court's detailed examination of the legislative history led to the conclusion that "it counsels against an expansive interpretation of the term 'coal' and a broad-based imposition of the reclamation fee, as urged by the government." App. 73a.[19]

That conclusion was reinforced, in the Third Circuit's view, by the Secretary's own definition of the term "coal" as "combustible carbonaceous rock. . . ." App. 77a-78a. Recognizing that this definition was applicable "except

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moisture. App. 91a. The court found that it would be unreasonable to apply broadly the term "coal" to include water "which is not inherently a part of the mineral in its unmined state. . . ." App. 88a.

[19] The Third Circuit found that the "principal considerations" underlying passage of SMCRA compelled a narrow interpretation of § 402. App. 73a. In addition, the court carefully examined the cost projections on which Congress assessed the impact of the reclamation fee program on the coal industry and consumers, and concluded that "these projections strongly suggest that Congress intended to impose the fee on combustible coal only, and not, as urged by the government, on additional tonnage of rock, clay, and dirt." App. 74a.

where otherwise indicated," the Third Circuit found that while the Secretary's revised regulations suggested a different definition of the term "coal," those regulations exceeded the scope of the Secretary's authority under § 402 and were invalid to the extent that they purported to tax noncoal materials. App. 78a.[20]

In contrast to the Third Circuit, the D.C. Circuit completely ignored the ordinary meaning of "coal." But nothing in the language of § 402(a) or the legislative history of SMCRA reveals a congressional intent to allow the Secretary to depart from that ordinary meaning.[21] Indeed, as the Third Circuit's discussion of the legislative history of § 402 in *Brook Contracting* shows, there is every reason to believe that Congress intended the ordinary meaning of "coal" to control the implementation of the statute's commands.[22]

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[20] The D.C. Circuit also disagreed with the Eleventh Circuit's analysis of a similar statutory question in *A.J. Taft Coal Co. v. United States*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985). At issue in that case was the meaning of the term "coal" in the black lung tax provision of the Internal Revenue Code. The statutory question arose when a coal operator sought a refund of that portion of its black lung taxes that were levied on weight attributable to excess moisture. The coal company, which operated in Alabama, sought to reduce the tonnage subject to black lung taxes by the amount of moisture in excess of the 2.88% inherent moisture content common to Alabama coal. App. 89a-90a. Relying on the "plain meaning" of that term, the *Taft* court found that "coal" should not be construed to include excess moisture that was not part of the mineral in its unmixed state unless Congress expressed a clear intention to the contrary. App. 98a.

[21] The D.C. Circuit's concern about the additional ambiguity introduced by Congress' use of the word "produced" in conjunction with "coal" is unfounded. App. 5a-6a. Regardless of what point along the line from extraction to delivery constitutes coal "production," the focus of the analysis for reclamation fee purposes is "coal" itself and what it consists of.

[22] As the Third Circuit pointed out in *Brook Contracting*, any interpretation of the term "coal" that would give it other than its

The D.C. Circuit rejected the Third Circuit's analysis in its entirety: "Our review of the relevant legislative history leads us respectfully to disagree with the Third Circuit and agree with the district court below." App. 6a (footnote and citation omitted).

Finally, the practical consequences of allowing this conflict to persist justify this Court's review of the panel's decision. As it now stands, some coal companies, such as Drummond, will be governed by one interpretation of the statute, while other coal companies will be subject to a wholly different and conflicting interpretation.[23] This discrepancy in the implementation of what was intended by Congress and the Secretary to be a uniform statutory requirement is disruptive to the reclamation fee program, and is manifestly unfair to coal companies required to pay higher fees than their counterparts. Such a discrepancy, obviously unforeseen by Congress and contrary to its clear desire for a uniform national program, should not become a permanent part of

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ordinary meaning would be contrary to Congress' primary concern that reclamation fees not be implemented so as to impose a burden on the coal industry in particular and the national economy in general. App. 73a-74a. Furthermore, as the Third Circuit noted in *Brook Contracting*, an expansive interpretation of the term "coal" would be inconsistent with Congress' projections of the costs associated with the reclamation fee program. App. 74a-76a. The Third Circuit's analysis showed that these projections were based on Congress' assumption that a pound of coal would produce 10,000 BTU's of heat. App. 74a-75a. Such an assumption only made sense, the court found in *Brook Contracting*, if Congress envisioned each pound of coal as consisting of "combustible coal, and not some unspecified combination of coal and rock, clay, or dirt." App. 74a.

[23] As a result, coal companies undertaking mining operations in the Third Circuit will not be bound by the challenged portion of the Secretary's regulation, and will therefore be entitled to deduct the weight of rock, clay, dirt, and excess moisture in calculating reclamation fees. At the same time, Drummond and other coal companies subject to the Secretary's regulations cannot claim the benefit of those same deductions.

the regulatory landscape, and can be avoided by the granting of this petition.

III. THE D.C. CIRCUIT'S DECISION VIOLATED FUNDAMENTAL PRECEPTS OF STATUTORY CONSTRUCTION REAFFIRMED BY RECENT DECISIONS OF THIS COURT

The D.C. Circuit's misguided approach to statutory construction in its decision in this case further attests to the compelling need for review by this Court. The lower court's deliberate disregard of the ordinary meaning of language used by Congress and of the inferences that arise out of reasoned consideration of a statute's legislative history undermines Congress' reasonable expectation that reviewing courts will respect the means traditionally employed by the legislative branch to communicate its intent. In short, the D.C. Circuit's decision in this case means that even though Congress uses a well-understood term such as "coal" in a statute, the term may be defined to mean something entirely different at the whim of an administrative agency, and reviewing courts will not step in to require the agency to respect the ordinary meaning of Congress' language. This Court should not tolerate this step toward the dismantling of the ability of Congress to have confidence in the communicative power of its language.

Recent decisions of this Court have underscored the need for courts reviewing an agency interpretation of a statute to engage in a rigorous examination of its language and legislative history to discern congressional intent before invoking the deference doctrine. In *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143-143 (1984), for example, the Court warned that "deference is not to be a device that emasculates the significance of judicial review." And in *Chevron*, it reaffirmed the basic obligation of reviewing courts to "give effect to the

unambiguously expressed intent of Congress." 467 U.S. at 843.

While the D.C. Circuit in this case purported to follow the teaching of *Chevron*, its efforts to discern congressional intent were at best superficial and inadequate. In requiring courts to determine whether Congress evidenced its intent with respect to a particular issue, this Court in *Chevron* did not suggest that a reviewing court should ascribe dispositive significance, as the court below suggested, to Congress' failure to define the terms employed in a statute, App. 5a, or to disregard the ordinary meaning of the words used by Congress. As this Court has affirmed in prior cases, the ordinary meaning of statutory language is an invaluable source for discerning congressional intent.[24] Indeed, the D.C. Circuit itself in a recent case found *Chevron* to require consideration of the ordinary meaning of the words used by Congress in determining whether its intent is apparent.[25]

---

[24] *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 686-687 (1986) (Federal Reserve Board's definition of "banks" under the Bank Holding Company Act of 1956 inconsistent with "accepted ordinary commercial usage" of other statutory phrases such as "demand deposit" and "commercial loan").

[25] *Transbrasil S.A. Linhas Aereas v. Dep't of Transportation*, 791 F.2d 202 (D.C. Cir. 1986).

CONCLUSION

For the reasons stated herein, this petition for certiorari should be granted.

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No. 86-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-5827

DRUMMOND COAL COMPANY,
Appellant

v.

DONALD P. HODEL, Secretary of the Interior

Argued March 7, 1986

Decided July 22, 1986

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 82-02439)

Michael B. Barr, with whom Charles D. Ossola, Washington, D.C., was on brief for appellant.

Albert M. Ferlo, Jr., Dept. of Justice, with whom Alfred Ghiorzi, Dirk D. Snel and Beverly Perry, Dept. of Justice, Washington, D.C., were on brief for appellee.

James T. Hemphill, Washington, D.C., was on brief for amicus curiae, Mining and Reclamation Council of America, urging reversal.

Robert F. Stauffer, Washington, D.C., was on brief for amicus curiae, Nat. Coal Ass'n, urging reversal.

Before MIKVA, STARR, and SILBERMAN, Circuit Judges.

Opinion for the Court filed by SILBERMAN, Circuit Judge.

SILBERMAN, Circuit Judge:

Appellant Drummond Coal Co. challenges a regulation of the Interior Department's Office of Surface Mining (OSM). A full exposition of the facts and procedural history relating to Drummond's challenge appears in the district court's careful and thorough opinion granting the agency's motion for summary judgment. *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489 (D.D.C.1985). For the reasons stated herein, we affirm the district court's judgment.

The Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.* (1982), upon which the regulation at issue is premised, creates an Abandoned Mine Reclamation Fund to finance the restoration of land and water resources damaged by coal mining. *Id.* § 1231 (c)(1). The Fund's principal source of revenue is a fee assessed on each ton of "coal produced" in the United States. Coal operators are required to pay the Secretary thirty-five cents per ton of "coal produced" by surface mining and fifteen cents per ton of coal produced by underground mining, or ten percent of the value of the coal at the mine, whichever is less. *Id.* § 1232(a). Through a revised regulation, the Secretary has mandated that the fee be assessed on the gross weight of coal prior to sale—including impurities such as water which have not been removed. 30 C.F.R. § 870.12(b)(3)(i) (1985).

Drummond claims that the revised regulation exceeds the Secretary's statutory authority because it includes within the material taxed "excess" moisture attributable

to post-evacuation rainfall or washing, which Drummond asserts is not properly regarded as part of "coal." Drummond also argues, in the alternative, that the regulation constitutes an arbitrary and capricious deviation from the Secretary's past practice.[1] We do not find merit in either contention.

The Secretary's initial fee regulations, promulgated in October 1978, were not entirely clear as to what was subject to the tax:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use . . . .
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

30 C.F.R § 870.12(b) (1978). In Alabama (though seemingly nowhere else in the country), certain OSM personnel and at least six Alabama coal companies interpreted this regulation as analogous to Alabama's severance tax. Alabama law permits coal operators to deduct the weight of "excess" moisture—moisture in excess of 2.88% of the total weight of taxable coal.[2] *See* Ala.Code § 40.13-31

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[1] With an exception not here relevant, Section 1276(a)(2) of the SMCRA incorporates the arbitrary and capricious standard of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982).

[2] That percentage represents what Alabama has established as the "inherent" moisture content of coal in Alabama. Coal in its unmined state naturally contains some moisture, along with ash and sulfur. *See A.J. Taft Coal Co. v. United States*, 605 F.Supp. 366, 371 n. 7 (N.D.Ala. 1984), *aff'd mem.* 760 F.2d 279 (11th Cir. 1985). This contrasts with "non-inherent" or "excess" moisture, which accumulates after coal is extracted from the ground as a result of immersion in water during the washing process or exposure to rainfall. *See Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1493 (D.D.C.1985). The precise percentage of inherent moisture varies widely from one coal seam to another throughout the United States. *See A.J. Taft Coal Co.*, 605 F.Supp. at 369. Ala-

(1975); State of Alabama Department of Revenue, *Coal Severance Tax Regulation* (July 13, 1979). This interpretation, by which "excess moisture deductions" were made on approximately seventy percent of the coal tonnage reported by Alabama coal companies to OSM, came to the attention of OSM's Washington headquarters from a number of sources in 1980 and 1981. In response, OSM proposed new regulations in December 1981 to clarify its position:

> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) impurities, including water, that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from gross weight.

30 C.F.R § 870.12(b)(3)(i) (1982) (emphasis in original).

Drummond, one of the Alabama coal companies that had been deducting "excess moisture" in its quarterly fee filings with OSM from 1977 through 1981,[3] contends that the revised regulation, by taxing impurities not removed prior to sale, exceeds the Secretary's authority under the Act. According to Drummond, the SMCRA limits the Secretary to taxing coal with its inherent impurities, *see*

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bama's 2.88% figure for inherent moisture in coal is therefore an approximation that would not hold true even for all coal mined in that State. (OSM has noted, for example, that Alabama's Bureau of Mines found an average inherent moisture of 3.0% for Alabama coal seams).

[3] Drummond inadventently omitted the excess moisture deduction from the tonnage report for the last quarter of 1981 and claimed a "refund" in its first quarter 1982 report. OSM denied the refund claim and disallowed any future deductions, but it has not, as far as the record shows, sought to recoup from Drummond the amounts deducted between 1977 and 1981.

supra note 2.[4] The statute does not, in Drummond's view, permit the Secretary to tax that portion of the weight of coal represented by post-extraction added impurities such as rainwater or debris. Phrased in Gertrude Stein's style, Drummond argues that coal is coal is coal.[5] Congress, however, did not define "coal" in the statute—still less the term "coal produced," upon which the fee is levied. Like the district court, we do not find the ordinary meaning of that term unambiguous: " 'Production' could reasonably be interpreted to include the entire process of

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[4] Drummond's position comes close to advocating a Btu tax, because the *inherent* moisture and ash in coal also add nothing to its value as determined by the Secretary. Yet Congress rejected a Btu tax in the final version of the SMCRA. Its sole concession to a tax based on the heat value of coal was the provision whereby if 10% of the value of surface-mined coal at the mine, as determined by the Secretary, is less than 35 cents per ton, then the lesser figure is paid into the reclamation fund. *See* 30 U.S.C. § 1232(a); H.R. Rep. 218, 95th Cong., 1st Sess. 137, U.S.Code Cong. & Admin.News 1977, p. 669. The House Report stated that "only a small proportion of the low-heat sub-bituminous coal will be eligible for this reduced fee." *Id.* The contrast between this provision, based on heat value as determined by the Secretary, and the weight-based provision under which Drummond is taxed cuts strongly against Drummond's position in this case.

[5] In support of its argument, appellant relies on the reasoning of *A.J. Taft Coal Co.*, 605 F.Supp. at 366. In that case, the district court found that the Black Lung Tax on "coal sold by the producer" required the exclusion from gross weight of moisture in excess of the Alabama statutory 2.88% limit. Relying upon the "plain meaning" of the word "coal," the district court adopted the State's 2.88% severance tax standard. The *Taft* court distinguished the holding in *Drummond Coal Co. v. Watt*, No. CV82-H-1838-S (N.D.Ala. May 18, 1983) [Available on WESTLAW, DCTU database], with whose reasoning we today agree, by reference to the fact that the agency administering the Black Lung Tax had issued no clarifying regulations, and that there was "no clear intent in [the Black Lung Tax statute], as there was in the [revised OSM] regulation, to tax water or any other 'impurities.' " 605 F.Supp. at 371. To the extent that *Taft's* rationale nevertheless may implicitly contradict our own, we respectfully disagree with it.

extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction. . . . [N]owhere does the [SMCRA] specify what elements comprise a 'taxable' piece of coal." 610 F.Supp. at 1497. Drummond's "plain meaning" argument is further undermined by the prevailing industry practice between the passage of the SMCRA in 1977 and the final promulgation of the revised regulations in 1982. According to the record, the vast majority of U.S. coal operators, as well as OSM personnel outside of Alabama, interpreted the phrase "coal produced" as do the revised regulations.

In view of the ambiguity of the statutory language, then, unless Congress in the legislative history specifically disclosed its intent on the question at issue we must defer to the Secretary's construction of the Act. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Drummond contends that the legislative history indeed reveals Congress' intent on the matter at issue here—an intent inconsistent with the Secretary's regulations. In support of this contention, Drummond deploys the Third Circuit's decision in *United States v. Brook Contracting Corp.*, 759 F.2d 320 (3d Cir.1985). Our review of the relevant legislative history[6] leads us respectfully to disagree with the Third Circuit and agree with the district court below. *See* 610 F.Supp. at 1501 n.9. The legislative history simply does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations.[7]

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[6] The House Report states that the legislative history of the SMCRA would include the legislative history of previously vetoed versions of the enactment from the two prior Congresses. H.R. Rep. No. 218, 95th Cong., 1st Sess. 140, *reprinted in* 1977 U.S.Code Cong. & Ad.News 593, 672.

[7] There is, moreover, reason to doubt that the Third Circuit had jurisdiction over the suit in *Brook*. The Eleventh Circuit has held

Congress in fact never addressed the particular issue that we confront in this case. The House Report reflects general concern in connection with the level of the reclamation fee to be assessed, with the burden placed on the industry and consumers and with the inflationary impact of the fee. *See* H.R.Rep. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S.Code Cong. & Ad.News 669; *see also Brook*, 759 F.2d at 324-25 (discussing House Report). Those considerations were explicitly balanced, however, against the need to raise sufficient funds to meet program objectives. *Id.* In any event, we fail to see how the general policy concerns relating to the impact on industry and consumers—even standing alone—could be dispositive of the issue before us.

In support of its holding the *Brook* court reviewed occasions, during the three years of legislative deliberations leading to the 1977 passage of the Act, when Congress considered estimates of the ultimate cost of the reclamation fee to industrial purchasers of coal and consumers. *Id.* at 325-26. These estimates used rough ("conservative") assumptions about the number of Btu's per pound of coal—assumptions that the Third Circuit regarded as more consistent with "clean" coal than with coal that includes some amount of non-inherent impurities. *Id.* at 325. Congress also considered certain calculations based on the spot price per ton of coal, in which there was apparently no indication that the price had been adjusted to reflect the existence of such impurities. *Id.* at 325-26.

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that Section 1276(a)(1) of the SMCRA vests exclusive jurisdiction to review challenges to national regulations, like the regulations at issue here and in *Brook*, in the federal courts of the District of Columbia Circuit. *Drummond Coal Co. v. Watt*, 735 F.2d 469, 476 (11th Cir.1984). We are not compelled in this case to address this jurisdictional question. As the district court pointed out, it is indisputable that Section 1276(a) vests *either* concurrent or exclusive jurisdiction over suits like this in the United States District Court of the District of Columbia. Regardless of which interpretation is correct, the district court properly exercised jurisdiction over this case, and, therefore, so does this Court. 610 F.Supp. at 1494-95.

Finally, the *Brook* court cited the arguments of members of Congress advocating a lower, ten-cents-per-ton fee, premised on gross revenue calculations for total 1975 coal tonnage which the court thought to be exclusive of noninherent moisture and debris. Even if the scientific and mathematical calculations upon which the *Brook* court's analysis is founded are correct,[8] they do not establish, as *Chevron* requires, a specific congressional intent as to the interpretation of the words "coal produced." The Third Circuit's opinion appears to us to be based merely on speculative inferences from the legislative history harnessed to a conviction that the Secretary's regulation will cost too much.[9] Since Congress did not explicitly

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[8] The calculations reviewed by Congress assume 10,000 Btu's per pound of coal, whereas the *Brook* court cites figures compiled by the American Society for Testing and Materials (ASTM), the principal source for industry data, for a range running from 6,300 to more than 15,500 Btu's per pound of coal. *See* 759 F.2d at 325. Congress may have chosen the 10,000 Btu's per pound figure rather than a higher one to take account of the presence of non-inherent moisture or debris. Similarly, the Third Circuit states that "[t]here is absolutely no indication that Congress sought to include in the spot price of coal in adjustment for tonnages of non-coal material," *id.* at 326. This seems to assume, without citation of support, that the 1975 spot price was per ton of clean coal rather than for "run-of-mine" coal, *i.e.*, coal prior to the removal of non-inherent impurities. Finally, the House Report's figure for total 1975 coal production of 654 million tons which the *Brook* court cites, *see id.*, multiplied by the ten-cents-per-ton fee proposed by the House minority, would yield $65.4 million; yet the court quotes the minority report as claiming that the minority's proposed ten cent fee "could generate between $60 and $70 million dollars [sic] on an annualized basis." *Id.* (quoting H.R.Rep.No. 45, 94th Cong., 1st Sess. 168 (1975)). We cannot say that this differential was not included in whole or in part to account for the fee falling on certain quantities of non-inherent moisture or debris.

[9] Nor could it be argued, as the *Brook* court seems to suggest, that under the revised regulation the fee would as a practical matter be imposed on an unlimited amount of impurities. If the amount of

address the proper meaning of the words "coal produced" in either the statutory language or the legislative history, we conclude that the Secretary was authorized to give the term a reasonable construction. By leaving the operative statutory terms undefined and delegating broad rulemaking authority to the Secretary, *see* 30 U.S.C. §§ 1211, 1242(a) (1982), Congress has left a gap in the regulatory regime for the agency to fill. *See Chevron*, 467 U.S. at 842-44, 104 S.Ct. at 2781-83; *Montana v. Clark*, 749 F.2d 740, 745 (D.C.Cir.1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985). And in formulating a definition of "coal produced," the Secretary is entitled to balance the countervailing policies at stake. *See Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2782-83. We have no warrant to set aside the Secretary's interpretation, if reasonable, merely because we might strike this policy balance in a different fashion.

One cannot say that the Secretary's definition is unreasonable. The Secretary felt that important administrative considerations supported his interpretation: "[I]f moisture deductions were allowed, audit of operator records would be further complicated and laboratory analyses required to document moisture content." 47 Fed. Reg. 28,578 (1982). Further, he deemed it desirable to achieve "uniform application of Part 870 and equitable treatment of all operators." *Id.* Drummond contends that whatever administratve problems the Secretary would encounter elsewhere in the country, OSM's Alabama regional office would be able to police deductions for noninherent post-excavation moisture, presumably because of the apparatus already in place for administering Alabama's severance tax, which requires measurement of the total moisture content of coal for comparison with the

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non-inherent moisture or other debris in coal reaches a point where the portion of the fee ascribable to such impurities exceeds the cost of "cleaning" the coal, then the operators will of course remove the impurities rather than pay the fee.

2.88% figure established in the statute.[10] But the Secretary's desire to employ a national standard that uniformly prohibits deductions for post-excavation moisture is obvious commonsense. The inherent moisture of coal varies considerably among coal deposits in different parts of the country. Allowing excess moisture deductions for producers in all parts of the country would entail either the considerable burden of setting different inherent moisture levels for different localities or the inaccuracy (and inequity) of setting a single, approximate nationwide standard. And even if the percentage of *inherent* moisture in coal were uniform across the nation, or some approximate figure were selected, Drummond still has not suggested how the Secretary could avoid conducting complex and extensive audits to determine the accuracy of operators' measurements of *non-inherent* moisture and debris.

Drummond further contends that the Secretary's revised regulation is inconsistent with the definition of coal as "combustible carbonaceous rock" found elsewhere in the regulations. *See* 30 C.F.R. § 700.5 (1985). Appellant ignores the fact that this definition is prefaced by the words, "except where otherwise indicated." *Id.* The revised regulation clearly "otherwise indicate[s]" that impurities included in the gross weight prior to sale are to be treated as "coal" for purposes of the tonnage fee. This argument, moreover, like Drummond's statutory argument, overlooks the point that the crucial statutory language is "coal produced," not coal.

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[10] Alabama is seemingly unique in the "excess moisture" provisions of its severance tax. *Drummond Coal Co. v. Watt*, No. CV 82-H-1838-S, slip op. at 3 (N.D.Ala. May 18, 1983) [Available on WESTLAW, DCTU database]. Throughout Drummond has ignored the non-inherent *debris* mixed with the coal, although the logic of their position would apply to all impurities. *See Brook*, 759 F.2d 320 (3d Cir.1985). Drummond apparently avoided making this argument because the Alabama severance tax provides a mechanism only for calculating excess moisture.

Drummond also maintains that even if the Secretary's interpretation would be reasonable if adopted initially, it is nevertheless arbitrary and capricious because when promulgated in 1982 it constituted a change of policy without adequate explanation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Drummond thus seek to leverage the benefit of the "Alabama interpretation" it enjoyed for four years into a national policy which it asserts OSM cannot so easily change. We find this argument, to put it kindly, insubstantial. There was certainly no national policy reflecting Drummond's interpretation of the statute. The Secretary has represented to us that only twelve of 6000 operators took advantage of this "policy," eleven of whom were based in Alabama. At most, the record reflects some degree of confusion prior to 1982 at the lower echelons of OSM.[11] At the national level the agency's position has been unchanged since 1977. *See* 42 Fed.Reg. 62,714 (1977); 610 F.Supp. at 1503.

We do not say that the Secretary is or was forbidden to adopt Drummond's suggested definition of "coal produced." Rather, we hold that because Congress had no specific intention on this point, the Secretary, under Chevron, had the authority to fashion a reasonable interpretation. This the Secretary has done. The judgment of the district court is therefore

Affirmed.

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[11] Drummond doubts the Secretary's representation and seeks to impose a burden on the Secretary to affirmatively "prove" that all but 12 coal operators followed his policy prior to 1982—which, of course, would require the Secretary, in order to support his position here, to conduct an enormously burdensome audit of thousands of quarterly reports. But the precise number of confused coal operators is patently irrelevant. Drummond's position seems to us to stem from a profound misunderstanding of *State Farm's* rationale. That case does not hold that an agency is restricted in clarifying an ambiguous regulation that does not precisely convey an agency's statutory interpretation.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-2439

DRUMMOND COAL COMPANY,
Plaintiff,

v.

DONALD P. HODEL,* Secretary of the Interior,
Defendant.

June 11, 1985

Michael B. Barr, Hunton & Williams, Washington, D.C., for plaintiff.

Alfred T. Ghiorzi, Land & Natural Resources Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION
AND ORDER

JOYCE HENS GREEN, District Judge.

Before the Court are the parties' cross motions for summary judgment. The plaintiff, Drummond Coal Company, seeks declaratory and injunctive relief to prevent the Department of Interior (DOI) and the Office of Surface Mining (OSM) from enforcing regulations designed to govern the collection of reclamation fees under the Surface Mining Control and Reclamation Act of 1977 (SMCRA, the Act), 30 U.S.C. § 1201, *et seq.* At issue

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* Pursuant to Fed.R.Civ.P. 25(d), Donald P. Hodel has been substituted for William P. Clark as Secretary of the Interior.

is a recently revised regulation that determines the method by which the plaintiff must calculate the fee it is required to pay under the Act for each ton of coal produced. Drummond contends that this revision, undertaken to clarify existing regulations, is both inconsistent with the language of section 402 of SMCRA (30 U.S.C. § 1232) and contrary to prior administrative practice and policy. The defendant, in turn, argues that the revised regulation is "not repugnant to the language of the statute or its underlying purposes" and is consistent with prior practice. As such, the defendant concludes, the promulgation of the challenged regulation falls within the scope of DOI's broad rulemaking power and is entitled to "great deference" upon review by this Court.

For the reasons set forth below, the Court concludes that the Secretary did not exceed his authority in promulgating the challenged regulations. Accordingly, the defendant's cross-motion for summary judgment shall be granted.

I. *Background*

A. *Regulatory Framework*

In 1977 Congress passed the Surface Mining Control and Reclamation Act. The purpose of the Act, as stated by Congress, was in part to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). It was Congress' hope that the Act would "promote the reclamation of mined areas" while striking a "balance between protection of the environment . . . and the Nation's need for coal." 30 U.S.C. § 1202(f).

To achieve this end, Congress included in the Act a provision establishing an "Abandoned Mine Reclamation Fund." 30 U.S.C. § 1231. The terms of the fund program, as set out in section 1232(a) of the Act, required all coal operators subject to the SMCRA to pay into the

fund a reclamation fee of 35 cents for each ton of coal produced by surface mining.

In December, 1977 the Secretary of the Interior, acting through OSM, promulgated national regulations setting forth the procedures to be used by coal mine operators in computing their reclamation fees. 42 Fed.Reg. 62715 (1977). The regulations stated in pertinent part that:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

These regulations,[1] however, did not explain precisely how the "weight and value" of the coal at the time of initial sale or transfer was to be calculated. As a result, from 1977 to 1981 the regulations were subject to varying interpretations, both by operators and by certain OSM officials. In Alabama, for example, coal operators regularly reduced their "taxable" coal tonnage by claiming a deduction for the alleged "excess moisture" content of the coal.

Faced with evidence of confusion among operators and inconsistent interpretation by the OSM representatives, in December, 1981 the Secretary proposed revised regulations for reclamation fee computations. The revised regulations, ultimately approved in final form and codified at 30 C.F.R. § 870.12(b)(3)(i) (1982), stated in relevant part that:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.

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[1] The regulations promulgated in December, 1977 were incorporated in the final regulations issued nearly one year later. *See* 30 C.F.R. 870.12(b), 43 Fed.Reg. 49940 (1978).

(b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

. . . .

(3) The weight of each ton shall be determined by the actual gross weight of the coal.

(i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight. [Emphasis added.]

It is these 1981 revised regulations that serve as the focus for the plaintiff's challenge in this case. Before turning to the merits of Drummond's claim, however, a brief review of the coal company's involvement in this litigation is required.

B. *Factual and Procedural History*

Drummond Coal Company, a Delaware corporation, mines substantial amounts of coal in Alabama. Beginning in 1977 when the reclamation fee regulations were first issued, and continuing until June, 1982 when the revised regulations were promulgated, Drummond routinely subtracted a deduction for moisture from the actual tonnage of coal mined, before calculating the reclamation fee it believed was owing. The deductions were approved without exception by the OSM official responsible for the OSM region ("Region II") in which Alabama was located. Five other Alabama based coal producers also followed this practice. The operators insisted that their calculations were based on an Alabama state coal severance tax law [2] that permitted an excess moisture deduction.

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[2] Alabama's excess moisture provision sets a flat figure—2.88% of the gross weight of mined coal—as the "inherent moisture" content of the coal. Any moisture content over and above 2.88% may

According to OSM, it was not until March, 1981 that the Secretary discovered that certain operators were subtracting a deduction for moisture. Drummond's practice, in particular, did not come to the attention of the Secretary until March 13, 1982, when Drummond filed its report with OSM for the first quarter of 1982. In that report, Drummond explained that it had inadvertently failed to take a moisture deduction for December, 1981 tonnage, and that it expected to receive a credit for the "overpayment" of reclamation fees.

In March 1981, before Drummond's practice came to light, the Deputy Director of OSM ordered an investigation of the fee collection method used in Region II. (*See* Secretary's Record Supplement, Exhibit D). The results of that investigation—revealing a unique, albeit accepted, practice of excess moisture deductions in Alabama—sparked a policy decision at the highest levels of OSM to bring Region II and Alabama in line with what the Secretary argues had always been OSM's nationally accepted method of fee calculation. Accordingly, in December, 1981 OSM promulgated the revised regulations. OSM notified Drummond on July 23, 1982, that OSM regulations did not permit an "excess moisture" deduction. Citing the revised regulations, OSM informed Drummond that "the deduction claimed . . . for the fourth quarter of 1981 and all subsequent quarters is disallowed. . . . Any future requests for refund of fee payments should . . . not [be] 'offset' by reduced payments in subsequent quarters." Secretary's Record Supp. Exh. C.

Drummond responded immediately to OSM's decision by filing two separate actions simultaneously—one in the Northern District of Alabama, *Drummond Coal Co. v. James Watt*, No. CV82-H-1838-S (slip op. May 18, 1983), and the other before this Court. The complaints, identical

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be deducted from the gross taxable tonnage. Ala.Code § 40.13-31. *See* Coal Severance Tax Regulations, State of Alabama, Dep't of Revenue, Montgomery, Ala., July 9, 1979.

in all substantive respects, sought declaratory relief and injunctive relief. Specifically, Drummond requested that the revised 1982 regulations be declared and adjudged "arbitrary, [and] capricious[,] an abuse of the Defendant's discretion[,] and . . . inconsistent with . . . [the] SMCRA." Plaintiff's Complaint at 7. The complaint further requested that the defendant be permanently enjoined and restrained from enforcing or applying the challenged regulations.

At the heart of Drummond's objection to OSM's action was its belief that a coal operator should not be taxed for excess moisture added to the coal after severance and extraction from the ground. According to Drummond, coal was often exposed to water in the mine, or to rain, after severance and before sale. Absorption of this water might add to the gross weight of the coal, but not its value. It made little sense, Drummond argued, to tax an operator based on a gross weight that did not reflect the true quantity of coal removed from the ground.

Insofar as the SMCRA was designed to tax coal and not water, Drummond insisted, the revised regulations exceeded the scope of the Act and thus were unlawful. More importantly, Drummond noted, between 1977 and March, 1982, OSM never objected to a request from a Region II operator for a moisture deduction. From Drummond's perspective, therefore, the 1982 revised regulations represented a departure from a prior administrative practice without a "reasoned justification". Plaintiff's Motion for Summary Judgment at 16-17. As such, the Secretary's decision to promulgate the regulations was arbitrary and capricious, and constituted an abuse of discretion. For these reasons, Drummond argued, the regulations should be held void.

Shortly after the filing of the complaints, the Secretary filed a motion in the Northern District of Alabama to dismiss or transfer the Alabama case on the ground that the SMCRA provided for exclusive jurisdiction in the

District of Columbia. On January 13, 1983, the Alabama court denied that motion. One week later, the Secretary requested a permanent injunction to prevent further prosecution in the Northern District of Alabama. Drummond opposed that motion by moving to stay all proceedings in the District of Columbia pending the outcome of the suit in the Northern District of Alabama. On February 24, 1983, this Court granted Drummond's motion to stay.

In response to Drummond's challenge on the merits, the Secretary asserted two central claims. First, the Secretary argued that the revised regulations did not represent a change from prior administrative practice because Region II officers—allegedly the only officers to approve excess moisture deductions[3]—were never *authorized* to grant deductions. Actions, of these "insubordinate" officials, the Secretary insisted, could neither bind DOI nor constitute the Department's official administrative practice or policy.

Second, the Secretary argued that the regulations were entitled to "great deference" on review because they were consistent with the broad, remedial purposes of the SMCRA, and promoted the twin agency goals of uniformity in application and administrative efficiency. Specifically, the Secretary maintained that the ambiguity of the 1977 regulations permitted certain coal operators to pay less tax by contracting to sell coal based on its "energy value" per ton, as opposed to its gross weight. The 1982 revised regulations, the Secretary pointed out, merely ensured that all operators would be taxed on the same basis and at the same point in the coal mining process; the new regulations, therefore, were national in both purpose

[3] According to the Secretary, only 12 out of 6000 coal operators nationwide were permitted to take deductions, and 11 of the 12 were based in Alabama; the other was in Pennsylvania.

and design. The decision to promulgate could not be considered arbitrary or capricious.[4]

Subsequently, the United States District Court for the Northern District of Alabama ruled that the 1982 revised regulations were valid. That court concluded that the new regulations did not constitute a "substantive change in the policy of the agency," but rather represented a clarification of the SMCRA "so as to ensure uniform application of the law." *Drummond Coal Co. v. James G. Watt*, CV 82-H-1838-S (Slip op., N.D.Ala. May 18, 1983 at 6). The Court also found that the regulations were not inconsistent with the plain language of the Act:

> The regulations are invalid, Drummond argues, because they tax impurities such as water, while the Act authorizes a tax only on coal. This argument is not persuasive. The revised regulations are clearly within the scope of the agency's authority under the Act. Congress chose to tax tonnage of "coal." Obviously there are impurities mixed with coal—dirt, sulfur, water, etc. Congress made no attempt to remove from taxation this small percentage of impurities found in the mined coal. Had Congress been concerned that the inclusion of impurities would work an undue hardship on the coal operators, the tax could have been calculated in other ways. For example, Congress could have taxed the coal on its BTU content. Since Congress refused to distinguish coal from its impurities, the regulation requiring the inclusion of impurities in calculating gross weight at the time of initial sale, transfer, or use, is within the

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[4] Because the Secretary never attempted to recover the sums deducted by the Alabama operators from 1977 to 1981, Drummond limited its challenge to the validity of the 1982 revised regulations. As best as can be determined, the plaintiff has challenged only the prospective enforcement of the 1982 regulations. Accordingly, this decision does not purport to address the validity of the 1977 regulations, or the propriety of the Secretary's actions carried out under those regulations.

> scope of the agency's authority. The fact that the impurities involved here are "added" to the coal after it is mined does not change the result. Again, Congress was well aware that after mining and before sale or use, coal is exposed to water from a variety of sources.

Drummond, slip op. at 7.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and vacated the Alabama district court decision. Although the Court expressed its "belie[f] that Drummond's challenge to the revised regulations is wholly without merit," the basis of the decision to reverse and the actual *holding* of the case were limited to the conclusion that section 1276(a)(1) of the SMCRA "vests in the United States District for the District Court of Columbia exclusive jurisdiction over th[e] case." *Drummond Coal Co. v. Watt*, 735 F.2d 469 (11th Cir.1984).

With the Alabama litigation complete, this Court lifted the earlier stay. Thereafter, cross motions for summary judgment were filed on the very issues that the Eleventh Circuit found itself without jurisdiction to review. It is to these motions that the Court now turns.

II. *Jurisdiction*

Before reaching the merits of Drummond's claim, a jurisdictional question need be addressed. 30 U.S.C. § 1276 (a)(1) states that:

> Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. *Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be sub-*

> *ject to judicial review in the United States District Court for the District of Columbia Circuit.* Any other action constituing rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary. [Emphasis added.]

Before the Eleventh Circuit, Drummond argued that this section conferred concurrent jurisdiction over the case on the United States District Court for the District of Columbia and on "all other district courts that otherwise would have jurisdiction. . . ." The Eleventh Circuit disagreed with this interpretation, accepting instead the Secretary's argument that Congress intended to vest *exclusive* jurisdiction over challenges to national regulations in the District Court for the District of Columbia. The Eleventh Circuit drew support for its conclusion from a decision by the Fourth Circuit, *Tug Valley Recovery Center v. Watt*, 703 F.2d 796 (1983), but noted that other circuits had reached the opposite conclusion. *See, e.g., Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (6th Cir. 1981), *cert. denied sub nom. Watt v. Holmes Limestone Co.*, 456 U.S. 995, 102 S.Ct. 2280, 72 L.Ed.2d 1292 (1982).

For the purposes of this suit at this point in the proceedings, it matters little whether the jurisdictional deci-

sion of the Eleventh Circuit in the "duplicate" case filed in Alabama would or would not be held appropriate upon review by the Supreme Court. Regardless whether this Court has *concurrent* or *exclusive* jurisdiction, the statute plainly provides the District Court for the District of Columbia with jurisdiction *in some form* over a challenge to national regulations. The cross motions for summary judgment, therefore, are properly before the Court.

III. *Consistency, Legislative Purpose, and Prior Practice*

Under the strict standard established by this Circuit, a motion for summary judgment may be granted only when it is shown that there "is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In ruling on a summary judgment motion, the Court must draw all inferences from the record in the light most favorable to the party opposing the motion." *Williams v. Washington Metropolitan Area Transit Authority*, 721 F.2d 1412, 1414-15 (D.C. Cir. 1983). "To warrant summary judgment the record 'should show the right of the [movant] to a judgment with such clarity as to leave no room for controversy. . . .'" *Weiss v. Kay Jewelry Stores, Inc.*, 470 F.2d 1259, 1262 (D.C. Cir. 1972).

In this instance, neither party disputes the validity of the evidence contained in the administrative record. The sole issues that remain for resolution are legal ones: (1) whether the decision to promulgate the 1982 revised regulations constitutes an unlawful abuse of discretion on the part of the Secretary because the regulations are inconsistent with the language and purposes of the Act; and (2) whether the Secretary's decision to promulgate the revised regulations should be held arbitrary and capricious insofar as it represents a change in prior administrative practice for which no reasoned justification has been offered. Disposition of the suit on summary judgment, therefore, is proper.

A. *Statutory Language and Legislative History*

1. *The "Deference" Standard*

It is well established that when faced with a problem or statutory construction, "great deference [must be shown] to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). *See also EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83, 101 S.Ct. 295, 306, 66 L.Ed.2d 268 (1980). Deference becomes all the more important when the interpretation of an administrative regulation is involved. *Id.* In that instance " 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217, 89 L.Ed.2d 1700 (1945), *quoted in Udall*, 380 U.S. at 16-17, 85 S.Ct. at 801-802.

To sustain the agency's interpretation, the Court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result [that] would have [been] reached had the question arisen in the first instance in judicial proceedings." *Udall*, 380 U.S. at 16, 85 S.Ct. at 801. To the contrary, the burden rests with the party challenging the administrative action to demonstrate invalidity. "Absent a contrary indication in the statute," the Secretary's judgment must be accepted. *In Re: Permanent Surface Mining Regulation*, 653 F.2d 514, 522 (D.C. Cir. 1981). As both the Supreme Court and this Circuit have noted,

> it is not a reasonable canon of interpretation [to assume] that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . [This] is precisely one of the rea-

> sons why regulatory agencies . . . are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

American Trucking Ass'n v. United States, 344 U.S. 298, 309-10, 73 S.Ct. 307, 314, 97 L.Ed. 337 (1953), *quoted in In Re: Permanent Surface Mining*, 653 F.2d at 522. *See also Miller v. Youakim*, 440 U.S. 125, 145 n.25, 99 S.Ct. 957, 969 n.25, 59 L.Ed.2d 194 (1979); *Maryland National Capital Park and Planning Comm'n v. Lynn*, 514 F.2d 829, 834 (D.C. Cir., 1975) (burden rests on challenging party to overcome presumption of validity).

Application of the *Bowles* Court's "rebuttable deference" standard of review is particularly appropriate in this instance because the drafters of the SMCRA clearly intended to delegate to the Secretary broad rulemaking power. Section 201(c)(2) (30 U.S.C. § 1211) of the Act states that the Secretary shall "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." Similarly, section 412 (30 U.S.C. § 1242) of the Act provides that the Secretary "shall have the power and authority, if not granted it otherwise, to engage in any work and to do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer the provisions of this Subchapter." 30 U.S.C. § 1242(a).[5]

Even were Congress not to have granted the Secretary broad discretion in administering the Act, a "deference" standard of review would still be presumptively appro-

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[5] Indeed, as the defendant points out, the phrase "all things necessary or expedient" is rarely used by Congress. *See* Defendant's Mem. at 14, n. 11. Congress' decision to use that phrase in this instance, therefore, connotes a deliberate effort to delegate broad discretion to the Secretary for enforcement of the Act.

priate here because the regulatory framework underlying the SMCRA is the product of a long and complex legislative process:

> Deference to the administering agency is particularly appropriate when a complex regulatory statute emerges from a process of difficult legislative gestation. The Surface Mining Act was the result of a protracted effort, dating back to the Ninetieth Congress, and including presidential veto of bills passed by the Ninety-third and Ninety-fourth Congresses. From such a process of compromise and adjustment, a symmetrical statute containing explicit answers to every question of administrative implementation is unlikely to emerge.

In Re: Permanent Surface Mining, 653 F.2d at 522.

OSM's interpretation of the 1977 regulations, therefore, and of the statute as set forth in the revised regulations, must be accorded broad deference unless the record reflects that the agency's interpretation is "plainly erroneous", *Udall*, 380 U.S. at 17, 85 S.Ct. at 801, or patently "inconsistent" with the earlier regulation. To determine whether deference should be accorded the Secretary in this instance, two questions must now be addressed: (1) whether the 1982 regulations are consistent on their face with the language of the statute and of the 1977 regulations; and (2) whether the 1982 regulations are reasonably related to the legislative intent and purpose of the SMCRA.

2. *Consistency with Statutory Language*

30 U.S.C. § 1232 states that a reclamation fee of 35 cents per ton of "coal *produced* by surface coal mining" shall be levied on all coal operators. Emphasis added. The term "produced" is ambiguous. "Production" could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's

door, or it could refer solely to the process of extraction. The latter interpretation would support the conclusion that impurities added after extraction, such as moisture, should not be taxed. The former interpretation would imply that the gross product sold to the buyer—even if it contains impurities and moisture—should serve as the basis for taxation.

The statute also fails to define the term "coal". Types of coal—such as "lignite" coal, surface mined coal, and underground coal—are distinguished, but nowhere does the Act specify what elements comprise a "taxable" piece of coal.

As published in 1978, the 1977 regulations did little to remedy these ambiguities. The 1977 regulations, *see* 30 C.F.R. § 870.12(b), 43 Fed. Reg. 49940 (1978), state only that

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the product of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.[6]

The preamble to the 1977 regulations, however, does provide some insight into OSM's interpretative intent. In response to a question from a commentator about whether the fee was to be paid on "clean coal" or "run of mine" coal, OSM stressed that the crucial factor was not the composition of the coal, but the point in the mining and selling process that "first sale or transfer" took place:

> Section 837.12(a) and (b) of the regulations specify that the fee be paid on each ton of coal produce for sale, transfer, or use and that the fee shall be

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[6] The 1977 regulations also include an "attempted" definition of coal. *See* 30 C.F.R. § 700.5, quoted in full *infra* Part III B, n. 9.

> determined at the time of initial bona fide sale, transfer of ownership, or use by the operator. For example, if the initial transaction is based on the weight of run-of-mine coal then the reclamation fee must be paid for each ton of run-of-mine coal sold, transferred or used. If the initial transaction is based on the weight of clean coal, then the reclamation fee must be paid on each ton of clean coal sold, transferred, or used.

42 Fed. Reg. 62714, Dec. 13, 1977 (Dec. 13, 1977). Significantly, this interpretation of the 1977 regulations was reiterated one year later, in 1978, in an OSM Solicitor's opinion:

> . . . The fee must be determined by the weight and value of the coal at the time of initial bona fide sale. More [sic] computations or estimations of the clean coal weight would not be in compliance. The coal would actually have to be cleaned prior to sale or use to meet the conditions in Section 837.12(b).

Advisory Opinion of Apr. 17, 1980, *quoted in* Plaintiff's Supp to Admin. Record, Attachment 3 at 3.

The 1982 revised regulations adopt the first of the two possible interpretations of section 1232. The regulations state expressly that the time of sale, and not the value of the coal, is the determining factor. Impurities that have not been removed before the time of initial bona fide sale, transfer of ownership, or use by the owner, will be taxed.

Both interpretations, however, are potentially consistent with the Act. The conclusion reached depends upon the particular objectives that Congress sought to further in enacting the legislation. If, for example, the Act's drafters intended to create a tax mechanism that would promote administrative efficiency and ensure consistent, evenhanded enforcement, the first interpretation is reasonable, for it envisions a flat tax based on a uniform time of sale. If,

however, Congress hoped to tax operators based solely on the value and quantity of coal extracted, then the latter interpretation would be most logical.

At one extreme, therefore, the 1982 regulations are not *in* consistent with the plain language of the statute or its supporting regulations. They simply make express what had been implied. Because the SMCRA does not contain an express provision to the contrary in the SMCRA, there is nothing "plainly erroneous" about interpreting "coal produced" to refer to the condition of the coal at the time of sale or transfer. At the other extreme, the 1982 regulations may be viewed as *consistent* with an interpretation of section 1232 that OSM represented as its own from 1977 until 1981. *See* Solicitor's Advisory Opinion of Apr. 17, 1980; preamble to 1977 regulations, 42 Fed.Reg. 62714 (Dec. 13, 1977). That this interpretation was not the only one possible is of minor consequence. *See Udall*, 380 U.S. at 16, 85 S.Ct. at 801. For purposes of this review, what matters is that the 1982 regulations were potentially consistent with a plausible—indeed, reasonable—interpretation.

In neither event, therefore, under either of the two possible interpretations, can the 1982 regulations be considered clearly inconsistent with the plain meaning and language of the statute.

3. *Consistency With Legislative Purpose*

In its 1977 House Report, Congress listed the objectives of the reclamation program as including

> the protection of health or safety of the public; protection of the environment from continued degradation and conservation of land and water resources; the protection or enhancement of public facilities as part of reclamation of land and water conservation projects; the improvement of lands and waters to a suitable condition useful in economic social develop-

> ment; and research and demonstration relating to the development of surface mining reclamation and water quality control program methods.

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 169; U.S. Code Cong. & Ad.News 593, 700 (1977). An earlier House Report that accompanied the SMCRA made clear that the reclamation fund provisions were designed to be remedial in purpose and function:

> [T]he widespread environmental degradation associated with coal surface mining—including the indiscriminate dumping of coal mine waste on the land surface and into streams—has resulted in the serious deterioration of the social and economic climate of affected regions. Where states have not accepted the burden of rehabilitating these regions, the environmental and social costs have devolved upon local residents. The injustice of requiring persons least able to shoulder such an enormous burden to do so is obvious.

H.R.Rep. No. 93-1072, 93d Cong., 2d Sess. 116 (1974). It was considered critical, therefore, that the fee provisions generate sufficient revenue to fund the Abandoned Mine Program. *See id.* at 117. Early reports estimated that as much as $180 million per year would be needed to meet "high priority program needs." *Id.*

The bill's sponsors, however, hoped to find a way to impose a reclamation fee without "constrain[ing] the development or production" of coal:

> Several principal considerations form the basis for the . . . reclamation fee:
>
> First, to set the fee at such a level that it is not a burden on the industry;
>
> . . . .
>
> Third, to structure the fee so it would not exert an inflationary influence in the economy.

H.R.Rep. No. 95-218, 95th Cong., 1st Sess, 136, 137, U.S. Code Cong. & Ad.News 593, 668-69 (1977). To achieve this end, Congress devised a differential fee based solely on the genus of coal mined. Types of coal were limited to three: surface mined coal was to be taxed at 35 cents per ton; underground mined coal at 15 cents per ton; and lignite coal at 10 cents per ton. *See* 30 U.S.C. § 1232 (a). Significantly, Congress expressly *rejected* an amendment to the reclamation fee provisions that would have provided for a uniform tax based on the BTU content (energy value) of the coal, *see* H.R.Rep. No. 93-1072, 93d Cong., 2d Sess. 116-17 (1974) (proposing fee of 1.23 cents per million BTUs), and *rejected* proposed amendments that would have permitted credits or deductions for state severance tax payments that, in turn, either provided for excess moisture deductions or were based on BTU value. *See* 120 Cong.Rec. H25230 (July 25, 1974) (amendment of Congressman Seiberling proposing a tax of $2.50 per ton of coal mined minus a credit of $0.01 for each 1000 BTUs "by which the weighted average BTU value of coal mined . . . falls below 16,000 BTU per pound"); 121 Cong.Rec. H6809 (Mar. 17, 1975) (amendment of Congressman Regula proposing a credit for "the amount of any reclamation fee or severance tax . . . paid to the State during that year.").

This decision to base the fee on the weight of the coal at a given *time* during the coal production process, and not on the value or "inherent content" of the coal, was not an arbitrary choice unsupported by logic or reason; to the contrary, by focusing on uniformity of application rather than value Congress furthered three legitimate and important governmental interests.

First, the time-based tax ensured that the Abandoned Mine Reclamation Fund provisions would be enforceable. Clearly, a BTU tax, or any tax requiring a determination of moisture content, possesses the inherent liability of entangling federal authorities in the complicated process

of overseeing testing for impurities. A tax based on gross weight at a definable point of time in the production process, however, avoids this problem because it eliminates the need to test. Second, by selecting an enforceable tax, Congress ensured that the funds necessary to conduct the program would be available. Given Congress' concern that the cost of rehabilitating environmentally degraded areas not fall upon the shoulders of those [citizens] least able to afford it, *see supra*, H.R.Rep. No. 93-1072, 93d Cong., 2d Sess. 116 (1974), the mine program's financial health was of critical importance. Third, by selecting a *time*-based tax Congress avoided the need to "choose [arbitrarily] between impurities". If excess moisture were a deductible impurity, operators might argue, why not also deduct the weight of other impurities, such as sulphur, dust, or debris. Once caught in a technical debate over the "true" elements of "pure" coal, there might, conceivably, be no end to the deductions claimed. To permit such a situation would jeopardize efforts to meet the costly, remedial purposes of the Act without imposing new taxes—clearly an "inflationary influence,"—on other sectors of the economy. *See* H.R.Rep. No. 95-218, U.S.Code Cong. & Ad.News at 668-69.

The 1982 revised regulations are based on precisely these policy concerns. As discussed *supra*, although the preamble to the 1977 regulations and the Advisory Opinion of April 17, 1980, attempted to clarify the confusion surrounding the 1977 regulations and establish the reclamation fee as *time*, not value, based, the 1977 regulations continued to create uncertainty among operators. In 1980 OSM completed a review of the Abandoned Mine Reclamation Fund Fee Collection Program. The review covered enforcement activities from October 1977 through June 1980, and concluded that inconsistencies in the 1977 regulations had resulted in disparate treatment of coal operators. Specifically, OSM found that the wording of the preamble to the 1977 regulations had created a tax loophole that was currently being exploited by operators

in Region II. The preamble stated that the reclamation fee was to be computed "on the weight on which the initial transactions was based." Secretary's Record Supp., Exh. A at 12. The regulations themselves stated only that the fee was to be "based on the *weight at the time* of initial bona fide sale, transfer of ownership, or use by operator." *Id.* By devising contractual terms that permitted the operator to be paid at a higher rate for fewer tons of "clean" or "pure" coal, an operator would pay significantly less under the preamble interpretation because the "weight on which the transaction was *based*" would be the weight of the anticipated *clean* coal. Theoretically, therefore, two operators could tender the same gross weight of coal for sale, and depending on the contractual terms used, one might pay considerably less than than the other. Secretary's Record Supp., Exh. A at 11-13.[7]

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[7] OSM identified three possible ways of interpreting the regulations:

"1. The fee has been based on *real* weight of the coal (either run-of-mine or cleaned) at the time of sale.

"2. The fee has been based on the 'calculated' reduced weight (supported by lab analysis), *for which* the operator was *paid.*

"3. The fee has been based on the 'calculated' reduced weight (supported by lab analysis), even when the operator was *not* paid on the basis of fewer tons."

Secretary's Record Supp. Exh. A at 16. Drummond, OSM concluded, followed the third approach, and in so doing exploited a lucrative loophole:

"Drummond fits into the third category. Drummond sells coal by the ton and gets paid more or less per ton, according to the BTU's per ton. If the coal has more moisture, it has fewer BTU's *per ton*, and Drummond gets paid less per ton. (Note that Drummond does not get paid for *fewer* tons; they get paid less per ton.) Drummond is not the only company to be allowed this deduction; the IG report estimates that such a deduction reduced fees in Alabama by $304,811 over the 33-month period examined, and the FCO estimated that approximately 70 percent of the tonnage reported by operators in that State included an adjustment for excess moisture." *Id.* at 16-17.

In addition to this loophole, the OSM report also found that some operators in Region II were reading the plain language of the regulations to permit excess moisture deductions. Secretary's Record Supp., Exh. A at 10-11. Fearful that these interpretations would significantly and critically deplete the revenues needed to fund the Abandoned Mine Program,[8] thereby jeopardizing the broad, remedial purposes of the Act, OSM moved quickly to draft revised regulations unequivocally defining the fee as *time*, not value, based.

Viewed against this background, it is apparent that the 1982 regulations were promulgated out of a need to ensure uniform enforcement, a workable administrative framework, and adequate, "inflation free" funding. As a direct response to those parts of the 1977 regulations that failed to enforce effectively the remedial purposes of the SMCRA, the 1982 revisions are patently consistent with the legislative intent of the Act.

Finally, even were it not possible to identify the original purposes of the Act or analyze their relationship to the stated justifications for the 1982 regulations, the revised regulations would still survive judicial review because the explanation tendered by OSM reflects a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962).

Under the standard established by the Supreme Court, an agency's action will be found arbitrary and capricious if, *inter alia*, the agency has

> entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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[8] *See supra*, n. 7.

Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983), *quoted in Nat'l Ass'n of Patents on Hemodialysis and Transplantation, Inc. v. Heckler*, 588 F. Supp. 1108 (D.D.C. 1984). In this instance, the record does not support the conclusion that OSM entirely failed to consider an aspect of the problem. The rationale tendered to support the 1982 regulations is both reasonable and logical given the evidence of administrative confusion before the agency. More important, one cannot reasonably conclude, in the absence of express statutory language or legislative history to the contrary, that it was "implausible" for the Secretary to assume that Congress was aware of the importance of creating an administratively enforceable tax mechanism—one that would meet the funding needs of the Abandoned Mine Program without requiring overly-intrusive regulation of local operators. To the contrary, it is fair to assume that had Congress wanted to ensure that impurities added during the coal mining process, but not part of the "inherent content" of the coal, would not be taxed, it would have chosen one of the value-based amendments. Congress was free to strike a different type of balance between the needs of compliance and the nature of the tax burden on the coal operator.

In short, the 1982 regulations are neither patently "inconsistent" with nor plainly erroneous in their interpretation of the legislative purposes of the SMCRA.[9] Indeed,

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[9] In support of its position Drummond cites a recent decision by the Third Circuit, *United States v. Brook Contracting Corp.*, 759 F.2d 320 (3rd Cir.1985). In *Brook* the Third Circuit held that the 1982 regulations could not serve as a basis for including "rock, clay, dirt, and other debris in the computation of the reclamation fee." *Brook*, at 327. The court ruled that "[t]o the extent that the government interprets § 870.12(b) [the 1982 regulations] to authorize imposition of the reclamation fee on noncoal material mined by appellants here, we hold this regulation exceeds the scope of 30 U.S.C. § 1232(a) and is therefore invalid." *Brook*, at 327.

[Continued]

the revised regulations reflect governmental and agency interests which, in the absence of express language to the contrary, stand on their own as legitimate bases for agency action. As such, the agency's decision to promul-

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[9] [Continued]

In reaching its conclusion the Third Circuit relied heavily on legislative history indicating that:

"Congress was very much concerned about economic burdens to the economy in general, and the coal industry in particular. Congressional research went to great pains to project costs to the consumers and the industry that would result from implementation of the reclamation fees. These projections strongly suggest that Congress intended to impose the fee on combustible coal only, and not . . . on additional tonnages of rock, clay and dirt."

Brook, at 325. The legislative excerpts cited in *Brook* refer to cost studies contemplated, or actually undertaken, by Congress. Significantly, however, none of the excerpts noted by the court actually discuss the cost studies in the context of the question at issue here, and at issue in *Brook*. More important, *Brook* curiously ignores the legislative history underscoring Congress' equally pressing concern for the remedial purposes of the Act. As the *Brook* court points out, Congress' purpose in establishing the reclamation fund was to avoid burdening the coal industry and exerting inflationary pressures on the economy, *as well* as "providing sufficient funds for meeting program objectives within a reasonable time frame." H.R. Rep. No. 218, 95th Cong., 1st Sess., 170, reprinted in 1977, U.S.Code Cong. & Ad.News 593, 672; *see supra* at Part III A 3. Congress's goal was to satisfy *all* of these concerns. An objective analysis, therefore, must consider *all* of the legislative history. Because Congress did not expressly discuss whether the fee actually agreed upon (35 cents per ton) would constitute an undue burden on the coal industry or the economy if based on a definition of coal that included impurities, we respectfully disagree with the conclusion that legislative history focusing solely on a "concern for costs" is either persuasive or dispositive of the issues involved in this case. To the contrary, it would appear that had a concern for "burdens to the industry" been of paramount concern to Congress, proposed amendments basing the fee on the BTU content of the coal would not have been rejected in favor of the current "flat tax" approach.

Viewed in this light, then, the legislative history suggests that the remedial purposes of the Fund, and the need to rehabilitate those regions unable to absorb the costs associated with surface

gate the 1982 regulations is entitled to substantial deference.

B. *Prior Practice*

The Supreme Court has held that if an agency "chang[es] its course by rescinding a rule[,] [it] is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles*, 463 U.S. at 42, 103 S.Ct. at 2866. The Court has also pointed out, however, that " 'regulatory agencies do not establish rules of con-

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mining, were the focus of Congress' concern. The 1982 regulations are reasonably consistent with this purpose.

In reaching its conclusion, *Brook* also relied on the definition of coal as promulgated by the Secretary in 30 C.F.R. § 700.5:

"As used throughout this chapter, the following terms have the specified meaning except where otherwise indicated—

. . . .

"Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above." Because this definition does not expressly include impurities, the court reasoned that impurities could not reasonably be included in the term "coal produced by surface mining." 30 U.S.C. §§ 1201.

The Secretary correctly points out, however, that the definition of "coal" is irrelevant to the question at issue here. The regulatory scheme challenged in this instance assesses the reclamation fees based on weight at a given time, not based on value. The focus of this Court's analysis need only address the reasonableness of that scheme. If valid reasons exist to support the Secretary's decision to base this tax on "time" rather than "value", the manner in which coal is defined in section 700.5 clearly is not dispositive of the central issue. Of course, precisely the opposite would be true if Congress had in fact intended to base the tax on the inherent value of the coal mined. *Cf. A.J. Taft Coal Co. v. United States*, 605 F.Supp. 366 (N.D.Ala.1984), *aff'd without opinion*, 760 F.2d 280 (11th Cir. 1985) (distinguishing *Drummond* as a case that, unlike *Taft*, (1) does *not* involve the interpretation of a "statute and regulation which make reference only to coal", and (2) does not involve a tax based on the coal's BTU value).

duct to last forever.'" *Id. quoting American Trucking Ass'ns v. Atchinson, T. & S.F.R. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). "[A]n agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicles*, 463 U.S. at 42, 103 S.Ct. at 2866, *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S.Ct. 1344, 1368, 20 L.Ed.2d 312 (1968). When faced with "new developments", an agency "may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking*, 387 U.S. at 416, 87 S.Ct. at 1618. Regulatory agencies "are supposed, within the limits of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *Id.*

Drummond contends that the 1982 revised regulations represent a change in OSM's "policy and practice" for which a reasoned justification is required. It is Drummond's position that the Secretary has failed to provide the necessary "reasoned analysis." *Motor Vehicles*, 463 U.S. at 42, 103 S.Ct. at 2866.

Based on the record before the Court, there is little evidence to support the claim that the 1982 regulations represented a change in OSM policy on the *national* level. In the preamble to the 1977 regulations, discussed at length, *supra*, OSM clearly stated that the reclamation fee would be based on the gross weight of the coal in its current condition—with or without impurities—at the time of initial sale, transference, or use. Subsequent policy explanations released between 1978 and 1980 were largely consistent with this basic position. *See e.g.* Solicitor's Opinion of Apr. 17, 1980, cited in Drummond's Supp. to Admin. Record, Attachment 3 at 3 (discussed *supra*, Part III A 2). No official statement dealing with OSM's na-

tional policy may be found to the contrary in the administrative record.

OSM's practice and policy at the local level, however, is more complicated. According to the Secretary, only 12 of approximately 6000 coal operators nationwide claimed a moisture deduction. Defendant's Mem. at 4. Of those who claimed deductions, all but one were located in Region II. Affidavit of Jane S. Robinson, Secretary's Record Supp., Exh. E.[10] The Secretary cannot be bound, the defendant argues, by the action of maverick officials in Region II.

Drummond correctly points out that the 1981 Inspector General's report, drafted for the Assistant Secretary of the Interior and the Associate Solicitor, however, specifically found that "[t]he [1977] regulations concerning reclamation for computations are subject to various interpretations" and that "[a]s a result, the regulations have not been applied consistently by both the coal industry and OSM fee compliance personnel. . . ." Secretary's Record Supp., Exh. A at 10. *See also* Drummond's Supp. to Admin. Record Attachment 1 at 4. Other reports drafted by OSM personnel concede that "OSM has never disallowed . . . a deduction [for excess moisture]; we simply never gave it to anyone who did not ask for it." Drummond's Supp. to Admin. Record, Attachment 3 at 4. It is Drummond's position that the defendant's admitted failure to deny a single request for a deduction amounted to a prior practice or policy to permit deductions when asked. Insofar as the 1982 regulations altered this "prior policy", without justification, Drummond concludes, the Secretary's decision to issue the revised regulations was arbitrary and capricious.

Drummond's argument is flawed in several respects. First, on the basis of the record here it is difficult to con-

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[10] According to the affidavit, a fee compliance officer in Pennsylvania permitted an operator to take a deduction on one occasion. Affidavit of Jane E. Robinson, Secretary's Record Supp., Exh. E at 2.

clude that OSM knowingly and deliberately altered a prior practice. All but one of the excess moisture deductions were authorized by fee compliance officers in a single region—Region II. There is no indication that either senior OSM officials or the Secretary's Office learned that the deductions had been authorized for Alabama operators by the Region II Compliance Chief until well into 1981 when Steven Griles, Deputy Director of OSM, requested W. Hord Tipton, Acting Regional Director of Region II, to investigate the treatment of moisture deductions in Region II. *See* Drummond Supp. to Admin. Record, Attachment 2, Tipton letter of Aug. 6, 1981, at 1. Upon learning of Region II's policy and discovering general uncertainty over the proper interpretation of the 1977 regulations, OSM moved quickly to correct Region II's deviation and clarify the regulations. In short, once OSM was made aware of the problem, remedial action was taken relatively promptly. The record does not support the conclusion that senior OSM officials in Washington knowingly endorsed a policy of permitting moisture deductions.

Indeed, as a matter of law, the activities of insubordinates or misinformed government officials generally will not bind the government. *See Federal Crop Ins. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947) ("anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority"); *Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) (government not estopped from enforcing regulation where social security claimant given erroneous information by government field representative); *cf. Boggs v. Regan*, Civil Action No. 79-1090 (D.D.C., decided Sept. 18, 1981) (*Hansen* distinguished on grounds that plaintiffs made "every effort to obtain information from all sources *including the responsible decisionmakers.*" Slip op. at 5 (emphasis added)). In this instance, therefore, the activi-

ties of OSM officials in Region II cannot properly be attributed to the Secretary. Because Drummond and the other Alabama operators who requested moisture deductions did not seek advice from the highest levels of OSM, they were in effect charged under the law with knowledge of the proper meaning and intent of the 1977 regulations. Viewed from this perspective, it is difficult to find that OSM ever altered its practice, for without knowledge or legal responsibility for Region II's activities the Secretary could not have authorized excess moisture deductions.[11]

Yet, even if Region II's activities can be attributed to the higher levels of OSM, Drummond's argument remains flawed for a second reason. In cases where a reasoned justification for a policy change has been required, the agency involved made a distinct and decisive break from an affirmatively established rule or regulation. *See, e.g., Motor Vehicles* (rescinding an agency rule requires reasoned justification); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C.Cir.1984) (agency decision to return to old ICC rate base requires reasoned justification).

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[11] In support of its argument that the Secretary's interpretation of the Act is not entitled to deference, Drummond argues that the Secretary's interpretation is not "contemporaneous with enactment of [the] SMCRA." Plaintiff's Mem. at 15. Judicial deference to an agency interpretation, Drummond concludes, is "not warranted where [t]he interpretation is not contemporaneous with enactment of the statute [citing *General Electric v. Gilbert*, 429 U.S. 125, 142-43, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1975); *Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509, 1519-20 (D.C. Cir. 1984)]". *Id.*

To the extent that the Court now concludes OSM's current interpretation of the Act does not conflict with the prior administrative practice "begun when that statute became law," *id.*, Drummond's "contemporaneous" argument is essentially moot. Even were the Court less convinced that Region II's activities cannot be attributed to the OSM' *national policy*, the absence of any clear or consistent policy at the local level would militate against overturning the agency's decision on the grounds that the interpretation was "contemporaneous" with the enactment of the SMCRA.

In this case, however, there is no distinct, affirmative policy from which the 1982 regulations may be said to have deviated. OSM concedes that it never *denied* a deduction when requested, but it is also apparent that OSM never asserted in regulations, comments, or policy statements, that moisture deductions were permissible. Indeed, all of OSM's official pronouncements implied the opposite. In short, the lack of a consistent practice at the local level argues not for the conclusion that OSM had a prior practice different from that required by the 1982 revised regulations, but rather that OSM had no real policy at all at the local level.

Third and finally, even if the actions of OSM officials in Region II can be held to constitute a "prior practice" that may be imputed to the Secretary, the promulgation of the 1982 regulations represented a legitimate, justifiable response to the "demands of changing circumstances." *Permian Basin*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968). It is clear from the record that the confusion which developed in Alabama over the 1977 regulations represented an unexpected but serious threat to the Abandoned Mine Reclamation Fund Program. Given the broad, remedial purposes of the Act, the need to insure continued funding for the program, and Congress' clear intent to establish an administratively enforceable regulatory scheme that would not be based on a BTU or impurities-credit fee system, it was not unreasonable for OSM to promulgate new regulations designed to clarify the old. All of these reasons for the 1982 revisions—discussed at length *supra*—are contained in the administrative record. *See* Inspector General's Report, Secretary's Record Supp., Exh. A; Drummond's Supp. to Admin. Record, Attachments 1, 3.

IV. *Conclusion*

After a "careful and searching inquiry into the record . . . to assure itself that the agency has examined the relevant data and articulated a reasoned explanation for

its action," *Farmers Unions*, 734 F.2d at 1499, the Court concludes that a rational connection exists between "the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962).

Because the revised regulations are consistent with the plain language and purpose of the SMCRA, and because the challenged regulations do not constitute a change from a prior administrative policy or practice, the Secretary's interpretation of the SMCRA and the 1977 regulations is entitled to broad deference. Based on this record, the plaintiff has not met its burden of establishing that the challenged agency action was arbitrary and capricious.[12]

Accordingly, for the reasons set forth above, summary judgment must be granted in favor of the defendant. A separate Judgment accompanies this Memorandum Opinion and Order.

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[12] The Court notes that as a practical matter this decision need not work an undue hardship on the plaintiff. As the District Court in Alabama pointed out, there is nothing in the new regulations that would prevent an operator from removing impurities *before* the initial bona fide sale, transfer, or use. If Drummond chooses to clean or dry the coal before the coal is treated, there will be no tax on excess moisture or other impurities.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1986
CA No. 82-02439

No. 85-5827

DRUMMOND COAL COMPANY

v.

DONALD P. HODEL, Secretary of the Interior

[Filed Sept. 26, 1986]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Starr, Silberman, Buckley and Williams, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV82-H-1838-S

DRUMMOND COAL COMPANY,
Plaintiff,

vs.

JAMES G. WATT,
Defendant.

[Filed May 18, 1983]

MEMORANDUM OF DECISION

On August 27, 1982, plaintiff Drummond Coal Company (Drummond) filed in this court a petition for review and complaint for declaratory and injunctive relief. Drummond requests that the court review revised national regulations promulgated by defendant James G. Watt, Secretary of the Department of the Interior (Secretary), acting through the office of Surface Mining Reclamation and Enforcement (OSM), pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, et seq. (the Act). Drummond is petitioning the court to declare invalid and enjoin the enforcement of the Secretary's revision of 30 C.F.R. § 870.12 on the ground that it is arbitrary, capricious, and inconsistent with the law. The Act imposed a reclamation fee (the fee) on all coal produced for sale, transfer or use in the United States. The fee is imposed by Section 402(a) of the Act in the following manner:

> All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

Section 201(c)(2) of the Act empowers the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." More particularly, Section 412(a) of the Act empowers the Secretary "to engage in any work and do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer" the abandoned mine land program.

On December 13, 1977, under the authority delegated by the Secretary, OSM promulgated regulations which established procedures for the computation of reclamation fees. 30 C.F.R. Part 837 (42 Fed. Reg. 62713). These regulations, which were incorporated in the final regulations issued by OSM on October 25, 1978, provide in Section 870.12(b) that:

> The reclamation fee shall be determined by the weight and value [of the coal] at the time of initial bona fide sale, transfer of ownership or use by the operator.

30 C.F.R. § 870.12(b) (43 Fed. Reg. 49940).

These regulations attempted to establish a simple method of determining when the coal should be weighed and the value that should be used when establishing the amount owed by the operator. The regulations were uniformly applied in all states but Alabama. In Alabama,

Drummond and perhaps several other Alabama producers, with the knowledge of the Secretary, deducted "excess" moisture when calculating the weight of coal for purposes of computing the fee. Drummond defines "excess" moisture as water which is added to coal after it has been severed from the ground. This moisture, Drummond explains, is absorbed by coal when it is immersed in water during the washing process or when it is exposed to rainfall or other water that collects in the mine or pit. Since water adds weight but not value to the coal, Drummond argues that this added weight should not be subject to taxation.

These Alabama operators apparently had become accustom to taking this deduction when computing their tax under the Alabama Coal Severance Tax. See *Ala. Code* § 40-13-1, et seq. (1975). From the evidence before the court, it appears that Alabama has the only state severance tax which allows for such an "excess" moisture deduction in computing state severance taxes on coal.

The Secretary states that OSM has never interpreted its regulations to permit coal operators to deduct moisture content from the weight of their coal when calculating the reclamation fees which become due under the Act. But contrary to agency policy, the OSM fee compliance officer for Alabama permitted the "excess" moisture deduction to those Alabama operators who requested it. Elsewhere in the United States the fee was uniformly calculated without a deduction for moisture, excess or otherwise.

Due to the inconsistent application of the first set of regulations, the Secretary opted to promulgate a new set of regulations. On December 11, 1981, the Secretary published in the *Federal Register* proposed revisions to the Abandoned Mine Reclamation Program, including regulations for fee computations. 46 Fed. Reg. 60778 (1981). The preamble to the new regulations set forth the purpose for the revision to § 870.12: "T[o] clarify

the point in time of fee determination, as well as the weight parameters for calculating reclamation fees." 47 Fed. Reg. 28577, col. 3 (June 30, 1982).

The new pertinent part of the 1982 revised regulations including the clarifying provisions provides as follows:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of *in situ* mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> * * * *
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

47 Fed. Reg. 28594 (June 30, 1982).

Both the 1977 and 1982 regulations implement Section 402 of the Act and have national applicability to all operators of coal mining operations subject to the Act. Both regulations require computation of the reclamation fee on the basis of the weight and value of the coal at the time of initial bona fide sale, transfer or use by the operator. But most importantly for this present litigation, the revised regulations expressly prohibit coal operators from taking an "excess" moisture deduction. The issue before this court is whether the promulgation of these new regulations is within the scope of the Secretary's authority.

The standard of judicial review of the Secretary's general rulemaking authority to promulgate national rules or regulations is clearly established in Section 526(a)(1) of the Act which provides, in relevant part, the following:

> Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law.

The "arbitrary or capricious" standard of review is a limited one. The Supreme Court has stated the following concerning this standard:

> [T]he court must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

The arbitrary and capricious standard reflects two basic principles of judicial review of administrative action: that agency actions are presumed valid, *United States v. Southern Ry. Co.*, 364 F.2d 86 (5th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967), and that the burden is on the challenger to show that the agency's action violates the standard. *Maryland-National Capital Park and Planning Comm'n v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

Drummond contends that the June 30, 1982 clarifications to 30 C.F.R. 870.12 are arbitrary and capricious. However, the case law is clear that an agency's interpretation of a statute will be upheld so long as the interpretation is part of a range of reasonable interpretations. After a thorough review of the record presented in this action, this court finds that Drummond has failed to carry its burden of showing that the regulations are arbitrary or capricious.

Drummond argues that the new regulations amount to a substantive change in the policy of the agency without a rational explanation. This court views the new regulations as a clarification of the statute by the agency so as to ensure uniform application of the law. Drummond, in its own brief, cites an intra-agency memo which observes that the initial regulations were subject to varying interpretations and applications. *See* Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 5. Because the initial regulations were not being interpreted uniformly, the agency was acting responsibly by seeking to clarify its position. The preamble to the revised regulations states that one of the purposes of the regulations was to "clarify the weight parameters for calculating reclamation fees." This court views the action of the agency as reasonable and within the scope of its authority.

Drummond also contends that the new regulations are inconsistent with the plain language of the Act. The regulations are invalid, Drummond argues, because they tax impurities such as water, while the Act authorizes a tax only on coal. This argument is not persuasive. The revised regulations are clearly within the scope of the agency's authority under the Act. Congress chose to tax tonnage of "coal." Obviously there are impurities mixed with coal—dirt, sulfur, water, etc. Congress made no attempt to remove from taxation this small percentage of impurities found in the mined coal. Had Congress been concerned that the inclusion of impurities would work an undue hardship on the coal operators, the tax could have been calculated in other ways. For example, Congress could have taxed the coal on its BTU content. Since Congress refused to distinguish coal from its impurities, the regulation requiring the inclusion of impurities in calculating gross weight at the time of initial sale, transfer, or use, is within the scope of the agency's authority. The fact that the impurities involved here are "added" to the coal after it is mined does not change the

result. Again, Congress was well aware that after mining and before sale or use, coal is exposed to water from a variety of sources.

Finally, there is nothing in the new regulations which will prevent the coal operators from removing the impurities prior to the initial bona fide sale, transfer or use. If the operator chooses to clean or dry the coal before the initial sale, transfer or use, there will be no tax on water or other impurities, as Drummond contends.

For these reasons, this court is of the opinion that the challenged regulations are valid and not arbitrary or capricious. A separate order will be entered in accordance with this memorandum.

DONE this 18th day of May, 1983.

/s/ James H. Hancock
United States District Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-7366

DRUMMOND COAL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

JAMES G. WATT,
Defendant-Appellee,
Cross-Appellant.

July 2, 1984

Fournier, J. Gale, III, Birmingham, Ala., for plaintiff-appellant, cross-appellee.

Kathleen P. Dewey, Robert L. Klarquist, U.S. Dept. of Justice, Washington, D.C., Frank W. Donaldson, U.S. Atty., Herbert J. Lewis, III, Asst. U.S. Atty., Birmingham, Ala., Glenda Hudson, Div. of Surface Mining, Dept. of Interior, George R. Hyde, Dept. of Justice, Land and Natural Resources Div., Washington, D.C., for defendant-appellee, cross-appellant.

Appeals from the United States District Court
for the Northern District of Alabama

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Drummond Coal Company ("Drummond") appeals the judgment of the United States District Court for the Northern District of Alabama, denying Drummond's petition for review and its complaint for injunctive and declaratory relief from regulations promulgated by the Secretary of the Interior ("the Secretary"), acting through the Office of Surface Mining Reclamation and Enforcement ("OSM"), pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201 et seq. ("the Act"). The regulations at issue govern the reclamation fund created under the Abandoned Mine Land Reclamation Program established by the Act. Specifically, the challenged regulation determines the method by which Drummond must calculate the fee it is required to pay into the fund on each ton of coal it produces.

The Secretary filed a cross-appeal, challenging the denial of his motion to dismiss the case for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(3).[1] The Secretary maintains that Section 526 (a)(1) of the Act, 30 U.S.C.A. § 1276(a)(1), vests the United States District Court for the District of Columbia with exclusive jurisdiction to hear challenges to national regulations promulgated under the Act, and thus the district court here should have dismissed this case.

Although we believe that Drummond's challenge to the revised regulations is wholly without merit, we do not here reach that issue because we agree with the Secretary that Section 1276(a)(1) vests in the United States

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[1] The district court refused to certify the jurisdictional question for interlocutory appeal. The district court also denied the Secretary's motion to transfer the case to the United States District Court for the District of Columbia, pursuant to 28 U.S.C.A. § 1404, where Drummond concurrently had filed another action challenging the same regulation on the same grounds. On appeal, the Secretary does not challenge the denial of his motion to transfer the case.

District Court for the District of Columbia exclusive jurisdiction over this case. Consequently, we reverse the district court's decision on the jurisdictional question, vacate its decision on the merits, and remand the case with instructions to the district court to dismiss the action.

I.

Congress in 1977 enacted the Surface Mining Control and Reclamation Act for the purpose of, among other things, establishing "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C.A. § 1202(a), and promoting "the reclamation of mined areas left without adequate reclamation . . . which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C.A. § 1202(h). Title IV of the Act created the Abandoned Mine Reclamation Fund, 30 U.S.C.A. § 1231, and enacted a requirement that all coal operators subject to the statute pay into the fund a reclamation fee on every ton of coal they produce, 30 U.S.C.A. § 1232.

On December 13, 1977, the Secretary first promulgated regulations governing the payment of the reclamation fee. 42 Fed.Reg. 62713 (codified at 30 C.F.R. Part 870 (1981)). These regulations, which were incorporated in the final regulations issued on October 25, 1978, 43 Fed. Reg. 49940, provided that the fee was "determined by the weight and value [of the coal] at the time of the initial bona fide sale, transfer of ownership, or use by the operator." 30 C.F.R. § 870.12(b) (1981). The regulations did not prescribe the elements that define the weight and value of the coal.

The Secretary later discovered that some coal operators in Alabama, before calculating their fees, were sub-

tracting from the actual tonnage mined a deduction for the moisture content of the coal. The Secretary in June 1982 published revised regulations prohibiting such deductions. 47 Fed.Reg. 28593 (1982). The revised regulations stated that "[t]he weight of each ton shall be determined by the actual gross weight of the coal," 30 C.F.R. § 870.12(b)(3) (1983),[2] and specified that "[i]mpurities,

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[2] The revised regulation provides in full:

§ 870.12 Reclamation fee.

(a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.

(b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

(1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.

(2) The value of the coal shall be determined F.O.B. mine.

(3) The weight of each ton shall be determined by the actual gross weight of the coal.

(i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

(ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.

(iii) Insufficient records shall subject the operator to fees based on raw tonnage data.

(c) If the operator combines surface mined coal, including reclaimed coal, with underground mined coal before the coal is weighed for fee purposes, the higher reclamation fee shall apply, unless the operator can substantiate the amount of coal produced by surface mining by acceptable engineering calculations or other reports which the Director may require.

30 C.F.R. § 870.12 (1983).

including water, that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator shall not be deducted from the gross weight." 30 C.F.R. § 870.12(b)(3)(i) (1983).

In August 1982, Drummond filed this suit challenging 30 C.F.R. § 870.12 on the ground that it was arbitrary, capricious and inconsistent with the Act.[3] The Secretary in October 1982 moved the court to dismiss the case for lack of jurisdiction, arguing that Section 1276(a)(1) conferred exclusive jurisdiction to hear challenges to national regulations on the federal district court for the District of Columbia. The district court denied the motion in January 1983, concluding that the Act provided the District of Columbia district court with concurrent jurisdiction in cases involving national regulations. In May 1983, the district court entered judgment for the Secretary on the merits of Drummond's challenge, concluding that the regulations promulgated by the Secretary were valid and not arbitrary or capricious. Drummond filed its notice of appeal, and the Secretary cross-appealed from the May judgment and the January order insofar as they determined that the United States District Court for the Northern District of Alabama had jurisdiction to hear challenges to national regulations promulgated under the Act.

II.

We address first the jurisdictional question raised by the Secretary. The statutory provision governing jurisdiction, 30 U.S.C.A. § 1276(a)(1), states that:

> Any action of the Secretary to approve or disapprove a State program or to prepare or promul-

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[3] Drummond at the same time filed an action in the United States District Court for the District of Columbia. *See* n. 1 *supra*. On February 24, 1983, the district court in the District of Columbia entered an order suspending proceedings in that action until all proceedings, including appeals, in this case are completed.

> gate a Federal Program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. *Any action by the Secretary promulgating national rules or regulations* including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title *shall be subject to judicial review in the United States District Court for the District of Columbia Circuit.* Any other action constituting rule-making by the Secretary shall be subject to judicial review only by the United States Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with the law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

Id. (emphasis added).

The Secretary maintains that the plain language of the statute reveals Congress' intent to vest exclusive jurisdiction over challenges to national regulations in the District Court for the District of Columbia. In addition, the Secretary contends that the legislative history and purpose of the Act, as well as case law interpreting this statute and others and a survey of jurisdictional statutes, support the Secretary's conclusion. Drummond argues that the language of the statute and its legislative history support the conclusion reached by the court below that the statute confers concurrent jurisdiction on the District

of Columbia district court and all other district courts that otherwise would have jurisdiction of the case.

Only two other circuits have addressed this question, and they have not agreed on the answer. In *Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (6th Cir.1981), *cert. denied sub nom. Watt v. Holmes Limestone Co.*, 456 U.S. 995, 102 S.Ct. 2280, 72 L.Ed.2d 1292 (1982), the Court reversed the district court's determination that the statute vested exclusivse jurisdiction in the District of Columbia district court. *Id.* at 733. The Fourth Circuit, in *Tug Valley Recovery Center v. Watt*, 703 F.2d 796 (1983), without citing *Holmes Limestone* and with little discussion, disagreed.[4] *Id.* at 799 n. 3.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917). If the language is plain and does not lead "to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." *Id.* at 490, 37 S.Ct. at 196. When the "legislative purpose is expressed in 'plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms'." *United States v. Rutherford*, 442 U.S. 544, 551, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979) (quoting *United States v. Lexington Mill & Elevator Company*, 232 U.S. 399, 409, 34 S.Ct. 337, 340, 58 L.Ed. 658 (1914)).

Section 1276(a)(1) states that national regulations "shall be subject to judicial review in the United States

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[4] District courts also have decided the question both ways. Concluding that the statute confers exclusive jurisdiction are: *Virginia Mining & Reclamation Ass'n v. Watt*, No. 82-2799 (D.D.C. June 8, 1983) (unpublished opinion); *Reading Anthracite v. Office of Surface Mining Reclamation and Enforcement*, No. 80-0667 (E.D.Pa. October 8, 1980) (unpublished opinion); *Union Carbide Corp. v. Andrus*, 13 E.R.C. 1481 (S.D.W.Va. 1979). Concluding that the statute confers concurrent jurisdiction is: *Utah International, Inc. v. Department of the Interior*, 553 F.Supp. 872 (D.Utah 1982).

District Court for the District of Columbia Circuit." [5] The language that Congress chose for this provision indicates its intent. The word "shall" is a mandatory, not permissive, form [6] and indicates a congressional intent to require that judicial review of regulations having nationwide application occur in the federal district court in the District of Columbia. This result is neither absurd nor wholly impracticable. A rational basis can be conceived for centralizing review of national regulations. Congress may have had a particular desire to foster uniformity in the interpretation of these regulations.[7] Congress' provision in other statutes of a single avenue for judicial re-

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[5] No party challenges here the assertion that the regulation under review is a national regulation.

[6] The word "shall" has been defined as follows:

> *Shall.* As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. *People v. O'Rourke,* 124 Cal.App. 752, 13 P.2d 989, 992.
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> But it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. *Wisdom v. Board of Sup'rs of Polk County,* 236 Iowa 669, 19 N.W.2d 602, 607, 608.

Black's Law Dictionary 1233 (rev. 5th ed. 1979).

[7] *See* text accompanying nn. 11 & 12 *infra.*

view [8] and its subsequent enactment of this statute suggest that limiting review to one court is not impracticable.

Even if we were not to rely on the plain meaning of the statute, we would reach the conclusion that we do on the basis of the Act's legislative history and purpose, applicable case law, and Congress' treatment of other jurisdictional statutes. In so doing, we explicitly reject the reasoning and conclusions reached by the district court in this case and by the Sixth Circuit in *Holmes Limestone*.

The court below compared the Senate and House versions of the bill considered by the Conference Committee with the bill that emerged from Conference. The court noted that the House and Senate bills both provided that review of national regulations would occur *only* in the Court of Appeals for the District of Columbia, that review of actions by the Secretary to approve or disapprove a state program would occur *only* in the federal court of appeals for the circuit that contains the state whose program is at issue, and finally that review of any other action by the Secretary would occur *only* in the district court (House bill) or court of appeals (Senate bill) for the district in which the mining operation at issue is located. The district court noted that the bill that emerged from Conference omitted the word "only" in the sentences regarding the review of national regulations and state programs but retained the word in the sentence providing for the review of other actions by the Secretary. (It also changed the court in which review would occur from the circuit to the district.) The court concluded that the omis-

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[8] *See, e.g.*, 42 U.S.C.A. § 1973c (Voting Rights Act) (certain states seeking to impose new voter qualifications may institute an action in the United States District Court for the District of Columbia); 42 U.S.C.A. § 7607 (Clean Air Act) (certain regulations subject to review only in the United States Court of Appeals for the District of Columbia); 47 U.S.C.A. § 402(b) (Federal Communications Act) (certain orders of the FCC may be reviewed by the United States Court of Appeals for the District of Columbia).

sion of the word "only" from the sentence providing for review of national regulations was purposeful and indicated Congress' intent to create concurrent jurisdiction. The court found this conclusion bolstered by the retention of "only" in the sentence involving other actions by the Secretary. The majority in *Holmes Limestone*, *supra*, adopted essentially the same reasoning. 655 F.2d at 737.[9]

We cannot agree. The Conference Committee Report did not explain the reason, if any existed, for omitting the word "only" from the Conference bill. H.R.Rep. No. 95-493, p. 111 (1977), *reprinted in* 1977 U.S.Code Cong. & Ad.News 728, 743. Unexplained changes made in committee are not reliable indicators of congressional intent. *See Trailmobile Company v. Whirls*, 331 U.S. 40, 61, 67 S.Ct. 982, 992, 91 L.Ed. 1328 (1947). Although the omission may represent an intention to vest concurrent jurisdiction, as the government notes, it may represent instead a congressional recognition of the force of the word "shall" and an intention to avoid redundancy. Alternatively, as Justice White suggested in his dissent from the denial of certiorari in *Holmes Limestone*, the omission may have been completely inadvertent. 456 U.S. 995, 996, 102 S.Ct. 2280, 2281, 72 L.Ed.2d 1292 (1982) (White, J., with Blackmun, J., dissenting).[10]

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[9] In a separate opinion, Judge Merritt rejected the reasoning of the majority, but concurred in the result. *See Holmes Limestone Co. v. Andrus*, 655 F.2d 732, 739-41 (6th Cir. 1981) (Merritt, J., concurring), *cert. denied sub nom. Watt v. Holmes Limestone Co.*, 456 U.S. 995, 102 S.Ct. 2280, 72 L.Ed.2d 1292 (1982). Judge Merritt concluded that the language of Section 1276(a)(1) is unclear and the legislative history inconclusive on the matter of congressional intent.

[10] In support of its argument that the omission was intentional, Drummond suggests that without the explicit provision for judicial review in the District of Columbia district court, that court might not have venue over an action challenging national regulations promulgated under the Act, and thus inclusion of the provision merely indicates Congress' intention to ensure that the D.C. court

Legislative history reveals the purposes behind the Act and supports our conclusion. In enacting the Surface Mining Control and Reclamation Act, Congress sought to establish uniform national standards for the surface mining of coal and reclamation of lands damaged by past mining practices. Congress expressly found that uniform federal standards were essential "to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards . . . ." 30 U.S.C.A. § 1201(g). "The [House and Senate] Committees also explained that inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative." *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 280, 101 S.Ct. 2352, 2362, 69 L.Ed.2d 1 (1981) (citing S.Rep. No. 95-128, at 49; H.R. Rep. No. 95-218, at 58, *reprinted in* 1977 U.S.Code Cong. & Ad.News 593, 596). Although Congress also intended to provide the flexibility required by the widely differing local conditions under which mining occurs throughout the country,[11] its concern for minimum national standards ap-

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would have venue. The government correctly points out that under 28 U.S.C.A. § 1391(e)(1), except as otherwise provided by law, actions to review federal administrative decisions properly lie in the United States District Court for the District of Columbia.

[11] *See* 30 U.S.C.A. § 1201(f) ("because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States"), 30 U.S.C.A. § 1202(g) (a purpose of the Act is to "assist the States in developing and implementing a program to achieve the purposes of this Act"); 30 U.S.C.A. § 1253 ("Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations . . . shall submit to the Secretary . . . a State program which demonstrates that such State has the capa-

plicable to all is abundantly clear in the legislative history. A provision establishing one forum in which judicial review of nationally applicable regulations must occur is entirely consistent with this expressed concern.[12] It was on this basis that the Fourth Circuit in *Tug Valley, supra,* determined that jurisdiction to review national regulations promulgated under the Act was vested exclusively in the United States District Court for the District of Columbia. 703 F.2d at 799 n.3.

Our reading of the statute is further supported by the case law interpreting other jurisdictional statutes. "It is well settled that if Congress, as here, specifically designates a forum for judicial review of administrative action, that forum is exclusive. And this result does not depend on Congress using the word "exclusive" in the statute providing for a forum for judicial review." *Gardner v. Alabama,* 385 F.2d 804, 810 (5th Cir.1967), *cert. denied,* 389 U.S. 1046, 88 S.Ct. 773, 19 L.Ed.2d 839 (1968) (construing Civil Rights Act of 1964 and Social Security Act) (citations omitted) (citing *Whitney National Bank in Jefferson Parish v. Bank of New Orleans*

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bility of carrying out the provisions of this Act"); 30 U.S.C.A. § 1255 (State laws are not preempted by the Act unless inconsistent with it).

[12] Justice White adverted to another congressional purpose that supports the conclusion we reach here.

> . . . § 526(a)(1) provides that regulations with a national impact be reviewed in the District of Columbia, those with a statewide impact in the district court for the district of the capital of the State involved, and all other regulations only in the district where the surface mining operation at issue is located. By allowing a national regulation to be challenged in federal courts other than those in the District of Columbia, the Court of Appeals here arguably frustrated Congress' carefully devised plan for judicial review.

Watt v. Holmes Limestone Co., 456 U.S. 995, 996, 102 S.Ct. 2280, 2281, 72 L.Ed.2d 1292 (1982) (White, J., with Blackmun, J., dissenting from denial of certiorari).

& Trust Co., 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965)).[13] *See also Denberg v. United States Railroad Retirement Board*, 696 F.2d 1193, 1195 (7th Cir.1983) (construing Railroad Retirement Act of 1974) ("if there is a special statutory review proceeding, it is exclusive"); *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227, 1235 (9th Cir.1982) (construing Clean Water Act) ("when interpreting a [detailed regulatory] statute . . ., the remedies provided are presumed to be exclusive absent clear contrary evidence of legislative intent"); *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C.Cir.1979) (construing the Federal Aviation Act of 1958 and the Federal Communications Act) (" 'even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute' ") (quoting *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1279 (D.C.Cir.1977)).

Finally, we note that when Congress has intended to provide litigants with a choice of fora, it has done so expressly. *See, e.g.*, 12 U.S.C. § 1818(i)(2)(iv) (FDIC Act) (agency action may be reviewed in the United States Court of Appeals for the circuit in which the home office of the insured bank is located or in the United States Court of Appeals for the District of Columbia Circuit); 12 U.S.C.A. § 1848 (Bank Holding Company Act of 1956) (Federal Reserve Board action may be reviewed in the United States Court of Appeals within any circuit wherein the aggrieved party has its principal place of business or in the Court of Appeals for the District of Columbia); 29

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[13] The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

U.S.C.A. § 660(a) (Occupational Safety and Health Act of 1970) (OSHA Review Commission order may be reviewed in any United States Court of Appeals for the circuit in which a violation of the statute is alleged to have occurred or where the employer has its principal office or in the Court of Appeals for the District of Columbia); 49 U.S.C.A. § 1486(a) (Federal Aviation Act of 1958) (agency action may be reviewed by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia). The counter-argument that if Congress intended to confer exclusive jurisdiction it could do so expressly has already been rejected by the cases previously cited, which hold that explicit designation of a forum implies exclusive jurisdiction in that forum.

Thus, we conclude from the language of the statute, the legislative history and purpose of the statute, as well as from case law and other jurisdictional statutes, that Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. § 1276(a)(1), confers exclusive jurisdiction on the United States District Court for the District of Columbia to hear challenges to national regulations promulgated under the Act.

III.

For the foregoing reasons, we REVERSE the district court's decision on its jurisdiction under 30 U.S.C.A. § 1276(a)(1), VACATE its decision on the merits of Drummond's challenge to the revised regulations, and REMAND the case with instructions to dismiss the action.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 84-5607

U.S.A.

v.

BROOK CONTRACTING CORP.
(D.C. Civil No. 82-1362)

UNITED STATES OF AMERICA

v.

TRI-COUNTY LAND AND COAL COMPANY
(D.C. Civil No. 83-0171)

Appeal of Brook Contracting
Corporation and Tri-County
Land and Coal Company

Argued March 25, 1985

Decided April 18, 1985

Rehearing Denied July 10, 1985

Leon H. Kline (Argued), Sharon T. Walsh, Philadelphia, Pa., for appellants.

David Dart Queen, U.S. Atty., James J. West, First Asst. U.S. Atty., Harrisburg, Pa., Stuart A. Sanderson,

Office of the Sol., Beverly Perry (Argued), U.S. Dept. of the Interior, Washington, D.C., for appellee.

Before ALDISERT, Chief Judge, SLOVITER, Circuit Judge, and MANSMANN, District Judge.*

OPINION OF THE COURT

ALDISERT, Chief Judge.

In this appeal by two coal producing companies from summary judgment in favor of the government, we must decide what is meant by the expression "coal produced by surface mining" under the Surface Mining Control and Reclamation Act (SMCRA or the Act), 30 U.S.C. §§ 1201-1328. This is not mere semantic exercise, because upon our decision depends the extent of tonnage upon which a reclamation fee of 35 cents per ton may be levied by the Secretary of the Interior. The government argues, and the district court found, that tonnage of "coal produced" includes the weight of rock, clay, dirt and other debris mined with the "coal" that was delivered by the companies to a coal washing and sizing plant. The companies seem to borrow from Gertrude Stein's "a rose is a rose is a rose" and argue that coal is coal and it means a mineral that is combustible. We conclude that we have jurisdiction to hear this appeal, and that the district court erred in determining that all the material mined by appellants was subject to the reclamation fee. Accordingly, we reverse the judgment of the district court.

I.

Consolidated actions for collecting reclamation fees were brought by the United States against Brook Contracting Corporation and Tri-County Land and Coal Company in the district court. The complaints alleged

* Honorable Carol Los Mansmann, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

that the companies, which have identical corporate offices and are represented by the same counsel, owed $73,930.98 and $24,378.67 respectively in delinquent reclamation fees under the SMCRA. The companies had paid only for the combustible coal that was mined; the government concluded that they owed additional fees for the rock, clay, dirt and other debris that was unearthed in the surface mining process. The district court granted the government's motion for summary judgment and the companies' appeal followed.

II.

The SMCRA states in relevant part:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of *coal produced by surface coal mining* and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

30 U.S.C. § 1232(a) (emphasis supplied). The companies contend that the district court accorded an overly expansive meaning to the language "coal produced by surface coal mining." In construing the Act, the district court relied in part on 30 C.F.R. § 837.12 (now codified at 30 C.F.R. § 870.12):

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.
>
> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> * * * *

The companies argue that application of this regulation to support imposition of the reclamation fee on the total tonnage of material mined is an improper extension of the scope of 30 U.S.C. § 1232(a).

Because resolution of this case turns on statutory construction involving the interpretation and application of legal precepts, our standard of review is plenary. *University Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir.1981).

III.

As a preliminary matter we decide that we have jurisdiction, properly based on the final judgment rule of 28 U.S.C. § 1291. The government argues that the order appealed from is not final, relying on *UGI Corp. v. Clark*, 747 F.2d 893 (3d Cir. 1984). In *UGI*, a mining company sought a declaratory judgment that it did not owe reclamation fees and in a separate action the government sued the company to collect delinquent fees. The actions were consolidated and the district court awarded summary judgment in favor of the government on the declaratory judgment action. We dismissed the mining company's appeal from this order because there was no disposition of the consolidated collection case. The requirements of Rule 54(b), Federal Rules of Civil Procedure, were not satisfied and, therefore, there was no final judgment. *Id.* at 894. The *UGI* case differs from the case before us in which the only underlying action—the government's collection case—has been disposed of in favor of the government.

The government argues, however, that the judgment entered below is not final because the district court did not specify in its order the exact amount of fees owed by appellants. We find this argument unpersuasive. The government alleged in its complaint against Brook Contracting Corporation that "defendant owes the Secretary the total of $73,930.98 in delinquent reclamation fees

plus interest at the rate of one percent per month commencing thirty (30) days after the end of the calendar quarter for which reclamation fees are due. . . ." App. at 9a. The government alleged that Tri-County Land and Coal Company "owes the Secretary $24,378.67 in delinquent fees, plus such additional amounts as may be determined upon review of defendant's records," plus interest computed in the manner alleged in the Brook Contracting Corporation complaint. App. at 16a. In its motion for summary judgment the government stated:

> [T]he United States of America respectfully requests the Court grant summary judgment in favor of the Plaintiff and against the Defendants Tri-County Land and Coal Company and Brook Contracting Corporation *in the amounts, plus interests and costs, set forth in the respective complaints* filed in this matter and supported by the affidavits filed with this motion.

App. at 22a (emphasis supplied). The order of July 6, 1984 granted the government's motion for summary judgment. The exact amount of fees that the district court adjudged were owed by the companies can be readily determined by reading the complaint, the motion for summary judgment, and the July order in conjunction with one another.

We refuse to adopt a mechanistic and overly technical view of the final judgment rule contained in 28 U.S.C. § 1291. In *Hattersley v. Bollt*, 512 F.2d 209 (3d Cir. 1975), we held that a judgment of contribution against a general contractor in favor of a building owner arising out of a personal injury action was final and appealable notwithstanding the fact that the judgment did not specify a precise amount owed the building owner. *Id.* at 213. The building owner had been adjudged liable to the plaintiffs in an amount of $500,000. The judgment of contribution provided that the contractor would be liable for any amount in excess of $250,000 paid by the building owner to the plaintiffs. We stated:

> [B]ecause the judgment fixes [the contractor's] ultimate liability and clearly establishes the parameters of that liability, it is a final, appealable order. The Supreme Court of the United States has emphasized that "the requirement of finality is to be given a 'practical rather than a technical construction.'" *Gillespie v. United States Steel*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964).
>
> Where the practical effect of a judgment or order is final and only requires a ministerial act to implement it, such judgment or order is appealable under 28 U.S.C. § 1291. Since the effect of this district court judgment settles "the primary issue then existing between the parties," *Massachusetts Casualty Ins. Co. v. Forman*, 469 F.2d 259, 260 (5th Cir. 1972), and determines the rights and equities between the parties, it is a final judgment, notwithstanding any provision for future determination of the actual amount of recovery.

Id. at 213-214 (footnote omitted). We have no difficulty in holding, based on the language in the government's complaints, its motion for summary judgment and the district court order, and on the strength of *Hattersley*, that the order appealed from is final and that we have jurisdiction under § 1291. We turn now to the merits.

IV.

The government urges that we need not go beyond *United States v. Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir.1984), because that case qualifies as "the elusive case on all fours." To trace this metaphor to its original form, "the case runs on all four feet," we conclude that the government has added a leg or two to the facts in that case. In *Devil's Hole*, we affirmed the district court's factual finding that anthracite silt was "coal" and the removal and sale of the silt was "surface mining" and thus subject to the reclamation fee imposed by § 1232(a).

The government relies heavily on our affirmance of the Secretary's position that the noncombustible portion of the silt was properly included in calculating the weight upon which the reclamation fee was imposed. The government reasons that the noncombustible rock, clay, dirt and other non-coal material at issue in this case should likewise be included in the weight calculations. The case now before us, however, differs significantly.

In *Devil's Hole*, the district court's finding that anthracite silt was "coal," 548 F.Supp. 451 at 454 (E.D.Pa. 1982) was supported in the record by expert testimony and other evidence that anthracite silt was combustible and qualified as "coal" under American Society for Testing and Materials (ASTM) standard 388-77 based on its fixed carbon and BTU content. Numerous tests, including a reflectant's analysis and a point count analysis, also established that anthracite silt was coal. *Id.* This court affirmed the finding as not being clearly erroneous. 747 F.2d at 897. In the case before us now, however, there is no factual finding supported by expert testimony or any other evidence that the aggregate of material mined by appellants qualifies as coal under the ASTM standards. Accordingly, *Devil's Hole* does not support the government's position.

Were this simply a matter of comparing this case with *Devil's Hole*, our work would be at an end. But the master Cardozo has taught us that deciding cases is much more than a "color-matching" procedure.[1] Ap-

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[1] [Some judges believe that adjudication] is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly.

B. Cardozo, *The Nature Of The Judicial Process* 20 (1921).

pellants argue that the government interpreted and applied the SMCRA too broadly. Accordingly, we turn our attention to the Act's construction.

V.

Our review of the district court's interpretation of the critical phrase in § 1232(a) is plenary.

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 [99 S.Ct. 2326, 2330, 60 L.Ed.2d 931] (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 [82 S.Ct. 585, 591, 7 L.Ed.2d 492] (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 [100 S.Ct. 2051, 2056, 64 L.Ed.2d 766] (1980).

American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). It therefore devolves upon us to ascertain the legislative intent. "In the interpretation of statutes, the function of the court is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention." *United States v. American Trucking Association*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940). But here we will take as our starting point the legislative history, because it is extensive and extremely relevant. *See McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 51 S.Ct. 510, 75 L.Ed. 1183 (1931).

A.

In discerning this history, we are not limited to the Report accompanying the final Act. We are informed by

this Report that "[t]he legislative history of H.R. 2 [the SMCRA] includes the history of H.R. 25 . . ., S. 425 . . ., H.R. 9725 . . ., and H.R. 13950 . . . ." H.R.Rep. No. 218, 95th Cong., 1st Sess. 140, *reprinted in* 1977 U.S.Code Cong. & Ad.News 593, 672. These bills, virtually identical to H.R. 2, were passed by Congress in 1975 and 1976 but vetoed by the President. We have examined that history in detail and conclude that it counsels against an expansive interpretation of the term "coal" and a broad-based imposition of the reclamation fee, as urged by the government. Congress evinced concern that the provisions of the Act—particularly imposition of the reclamation fee—not be burdensome on the coal industry nor fuel inflation in the national economy.

> Several principal considerations form the basis for the Title IV reclamation fee:
>
> First, to set the fee at such a level that it is not a burden on the industry;
>
> Second, to provide at the same time sufficient funds for meeting program objectives within a reasonable time frame; and
>
> Third, to structure the fee so it would not exert an inflationary influence in the economy.

Id. at 137, *reprinted* in 1977 U.S.Code Cong. & Ad.News at 669. Notwithstanding these explicitly stated considerations, the government urges upon us an expansive interpretation of the reclamation fee provision that is not consistent with the stated "principal considerations".

B.

The legislative history instructs us that Congress was very much concerned about economic burdens to the economy in general, and the coal industry in particular. Congressional research went to great pains to project costs to the consumers and the industry that would result from implementation of the reclamation fees.

These projections strongly suggest that Congress intended to impose the fee on combustible coal only, and not, as urged by the government, on additional tonnages of rock, clay and dirt. For example, the House Report explained the effect that imposition of reclamation fees, passed on to the consumer by the coal producers, would have on the manufacturers or distributors of electric power, an industry conceded to be a primary large scale customer of coal producing companies:

> When [the increase caused by imposition of the reclamation fee is] translated into power costs per kilowatt hour—assuming conservative figures of 10,000 Btu's/lb. and a conversion rate of 10,000 Btu's/kWh—it is less than 0.015 cents per kWh of electricity. The consumer is utilizing 250 kWh per month, this represents an increase of 4 cents per month on his utility bill. The committee does not consider this small increase a burden on current coal consumers or inflationary in nature.

Id. The compelling conclusion is that the "conservative figure" of 10,000 BTU's per pound of coal was based on combustible coal, not on some unspecified combination of coal and rock, clay or dirt. This is clear because the ASTM has classified mineral matter-free coals by rank according to BTU content, ranging from 6,300 BTU's per pound to greater than 15,500 BTU's per pound. Appendix to Appellants' Brief at 4. Absent a valid factual finding to the contrary, and there is no such finding in the record before us, we will not conclude as a matter of law that the aggregate of material mined by appellants would have a sufficient BTU rating to qualify as coal.

C.

Still another aspect of the cost studies set forth in the legislative history of the SMRCA suggests that the appellants' proffered interpretation of the reclamation fee provision is correct. Detailed analyses were made to as-

certain the cost burden on the producers that, of course, would immediately be passed on to the consumers. As indicated, Congress projected the tonnage costs with production of heat, and came to the conclusion that there would be 10,000 BTU's per pound of coal, and that the conversion rate to electricity was approximately 10,000 BTU's/kWh. These figures can be transformed into the equation: 1 pound of coal = 1 kWh. Hence, in projecting the increase in electric utility bills that H.R. 25 would cause—increased coal costs resulting from both the reclamation fee and compliance with SMCRA's regulatory provisions—Congress reported that a $1.00 increase in a ton of coal translates into a .05 cent increase per kilowatt hour of electricity. H.R.Rep. No. 896, 94th Cong., 2d Sess. 148 (1976) (appendix). It is readily apparent that this figure was computed by assuming that 1 pound of coal = 1 kWh and then merely dividing the 1.00 increase/ton by 2000 to arrive at .05 cents. (1.00/2000 = .0005). Obviously this projected increase would be substantially higher if the underlying premise—that one pound of coal is required to produce one kilowatt hour—were rendered incorrect by the imposition of the reclamation fee on significant amounts of non-energy producing matter.

D.

But there were even additional cost studies made. Congress compared the increased costs in coal caused by enactment of the SMCRA to the total price of coal per ton. Again, in language reflecting congressional concern that the SMCRA not be financially burdensome on the coal industry, consumers and the general economy, the House Report states:

> The Library of Congress analysis concluded that even using overgenerous estimates of reclamation costs, the price of reclamation is small. If one adds the 35-cent-a-ton reclamation fee to an 85-cent-per-ton reclamation cost, the reclamation cost of $1.20 is

> only 6 percent of the spot price of $21.49 for 1976. The Library study concluded that the price of coal is not expected to be increased by this amount because coal prices are more reflective of the unusual situation in the energy markets than of small changes in production costs.

H.R.Rep. No. 218, 95th Cong., 1st Sess. 149, *reprinted in* 1977 U.S.Code Cong. & Ad.News 593, 631. There is absolutely no indication that Congress sought to include in the spot price of coal an adjustment for tonnages of non-coal material.

VI.

Then, too, the views of those members of Congress who dissented from passage of H.R. 25 are relevant. They opposed the Act because they believed 35 cents per ton was too high, and opted for a reclamation fee of 10 cents. They based their argument on the basis that the total tonnage of coal produced in 1975 was 654,000,000 tons. *See id.* at 72, *reprinted in* 1977 U.S.Code Cong. & Ad. News at 610. The dissenting report to H.R. 25 contended that the reclamation fee of 35 cents per ton was too high, "extracting unneeded cash from the consumer and the money supply. . . ." H.R.Rep. No. 45, 94th Cong., 1st Sess. 168 (1975). The dissenters advocated a fee of 10 cents per ton, stating that this "could generate between $60 and $70 million dollars on an annualized basis." *Id.* at 169. This is a computation based on the tonnage of combustible coal produced. Had these legislators been proceeding on the basis that the reclamation fee of 35 cents was to be applied to more tonnage than the 654 million tons of actual coal produced, that figure would have been included in their argument as an *a fortiori* proposition.

In sum, Congress's analysis of costs associated with imposition of the reclamation fee supports appellants' argument that Congress intended to impose the fee on tonnages of combustible coal only.

VII.

The definition of coal promulgated by the Secretary likewise militates against the expansive construction adopted by the district court. Title 30, C.F.R. § 700.5 states in pertinent part:

> As used throughout this chapter, the following terms have the specified meaning except where otherwise indicated—
>
> . . . .
>
> Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above.

We note that the provisions dealing with the imposition of the reclamation fee do not explicitly "otherwise indicate" an alternative definition of "*coal*," although 30 C.F.R. § 870.12(b)[2] seemingly permits reclamation fee

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[2] 30 C.F.R. § 870.12(b) states in pertinent part:

> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> (1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.
>
> (2) The value of the coal shall be determined F.O.B. mine.
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.
>
> (ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.

liability to be determined in the basis of the gross weight of *all mined* material at the time of the initial bona fide sale. To the extent that the government interprets § 870.12(b) to authorize imposition of the reclamation fee on the noncoal material mined by appellants here, we hold this regulation exceeds the scope of 30 U.S.C. § 1232(a) and is therefore invalid.

The government relies on *Combs v. Hawk Contracting, Inc.*, 543 F.Supp. 825 (W.D.Pa.1982). At issue in *Combs* was the meaning of a provision in the Coal Wage Agreement obligating employers to pay royalties into the Miners Pension Fund based on the amount of "coal produced by each employer for use or sale." *Id.* at 827. The district court rejected the company's argument that it could deduct the coal's ash content in computing its royalty payment, reasoning that any coal mine production sold or used as fuel qualifies for inclusion in calculating royalties. *Id.* *Combs* does not compel us to adopt the government's position here. First, and most obviously, *Combs* dealt with construction of a contract between the employers and the union. The court's task in that case was to determine the intent of the parties to the agreement. We scarcely need mention that a statute and a contract with similar provisions need not be construed identically because congressional intent may differ from the intent of parties to the contract. Second, the company's argument in *Combs* that the ash content be deducted from the coal weight is qualitatively different from appellants' argument here. Appellants do not seek a reduction in the coal tonnage based on impurities within the combustible coal itself. Rather they seek a reduction based on the weight of the overburden that is mixed with the coal prior to the washing and sizing operations. Much of this debris is loose material that is inadvertently "scooped" from the mine and loaded with the coal. App. at 41a-42a.

VIII.

We therefore hold as a matter of law, that as used in the statute, "coal produced by surface coal mining" means combustible coal that would qualify as such under ASTM standards and excludes the weight of rock, clay, dirt and other debris in the computation of the reclamation fee.[3] The judgment of the district court will be reversed with a direction to enter judgment in favor of the appellants.

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[3] Appellants also argue that the reclamation fee provisions as applied violate the equal protection component of the due process clause of the 5th amendment. Because we have disposed of this case on statutory grounds, we do not meet this issue.

UNITED STATES DISTRICT COURT
N.D. ALABAMA
JASPER DIVISION

Civ. A. No. CV82-PT-2145-J

A.J. TAFT COAL COMPANY,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

June 14, 1984

On Application for Attorney Fees
Aug. 22, 1984

Charles A. Powell, III, Stephen A. Rowe, Lange, Simpson, Robinson & Somerville, Birmingham, Ala., for plaintiff.

Frank W. Donaldson, Sharon Lovelace, Caryl P. Privett, Asst. U.S. Attys., Birmingham, Ala., Karl L. Kellar, Tax Div., Dept. of Justice, Washington, D.C., for defendant.

Fournier J. Gale, III, Roy J. Crawford, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Ala., amici curiae for Alabama By-Products Corp., Drummond Coal Co., McWane Coal Co. and Mulga Coal Co.

FINDINGS OF FACT AND
CONLUSIONS OF LAW

PROPST, District Judge.

UNDERLYING FACTS

During the years in question, April 1, 1978 through June 30, 1980, A.J. Taft Coal Company (Taft) was engaged in the business of surface mining coal in Walker County, Alabama (RT. 22). Taft's only customer was Alabama Power Company, which also owned the mineral rights to the land mined by Taft (Plaintiff's Exhibit [hereinafter "P.Ex."] 3; RT. 22, 25).

Taft sold coal on a washed and on an unwashed basis during the audit period (RT. 22). Coal to be sold on a washed basis was hauled by Taft trucks to the Bankhead washer where the trucks were weighed, loaded and unloaded, to determine tons of raw, unwashed coal (RT. 22). The Bankhead washer was neither owned nor operated by Taft, but rather was an independent facility (RT. 23). Alabama Power Company paid approximately $2.00 per ton to have Taft's coal washed (RT. 124). After the coal reached the washer, a float-sink test was performed on the Taft coal to determine the ratio of coal to refuse (RT. 24). Using this ratio, Alabama Power Company estimated the tons of coal that would remain after washing, for which it paid Taft (RT. 128). Taft was paid nothing for the refuse separated from the coal in the washing process and the Internal Revenue Service (hereinafter "I.R.S.") does not here seek to tax the refuse (RT. 50, 54).

Taft was paid based on the BTU content of the washed coal (RT. 82). The amount of BTU's per ton of coal is a measure of the quality of said coal; coal having a higher number of BTU's per ton is of better quality than coal with a lower number of BTU's per ton. (Transcript, 83; 122-23). The quality of coal, and its ability to release BTU's, is determined by the purity of said coal; the greater the amount of impurities in the coal, the fewer BTU's will be produced per ton of coal. (Transcript 122-123; 138-139; 141-143). Sulfur, ash, dirt, rocks, and ref-

use are all considered to be impurities which reduce the quality of coal. Water has no BTU content. (Transcript 122-123; 224-225; 226; 292-294; 56; 60). In paying its Black Lung Tax, Taft reported to the I.R.S. based on the calculated dry tons of coal which it sold to Alabama Power Company (RT. 50). Raymond Clemmons, the I.R.S. agent who audited Taft's records, adjusted the tonnage reported by Taft for washed coal sold by increasing the tonnage by six percent (RT. 13, 51). Clemmons arrived at the six percent figure by estimation (RT. 13, 78).[1] The six percent gross up of the weight of washed coal resulted in the addition of 1325.68 tons to the 22,094.68 tons of coal already reported (RT. 308-311; P.Ex. 21). The addition of these tons caused an additional tax of $331.43 to be assessed against Taft (RT. 308; P.Ex. 21).

Coal sold on an unwashed basis was delivered to the Gorgas Steam Plant or the Segco Mine where it was weighed and sampled by Alabama Power Company (RT. 53, 55). Taft was paid for this coal on the basis of the BTU value of the coal determined by Alabama Power Company, the purchaser (RT. 55). The unwashed coal was not processed by Taft before delivery and was sampled and analyzed in its raw, as-received state (RT. 56). The contract under which the coal in question was sold provides, in reference to the unwashed coal, that

> . . . Trucks delivering coal hereunder shall be weighed both loaded and empty, and the difference in weight shall be the governing weight hereunder. . . . The aggregate weights determined during any payment period *shall be accepted as the quantity of coal sold and purchased during such period for which invoices are to be rendered and payments to be made.* . . . (emphasis supplied).

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[1] The six per cent figure is not at issue *per se*. The plaintiff disputes that any percentage should be added.

The as-delivered weight of coal, as opposed to the dry weight, was used in determining the price paid Taft for unwashed coal (RT. 145). Taft paid its Black Lung Tax by eliminating, by mathematical calculation, all moisture in excess of 2.88%, which it estimated to be the inherent or bed moisture of the coal it mined (RT. 64). For purposes of the Federal excise tax, Taft originally reported gross tons of coal sold, without any adjustment for moisture. Only after learning that the State of Alabama had decided to allow for severance tax purposes a "moisture adjustment" for all moisture in excess of 2.88 percent, did Taft attempt to claim an equivalent adjustment for federal tax purposes. (Transcript, 91). Agent Clemmons added back the 2.88% which Taft eliminated and recalculated the tax due (RT. 66). This adjustment resulted in the addition of 3,557.83 tons to the tons of coal previously reported by Taft and in the imposition of an additional tax due of $889.46 (P.Ex. 21).

The total tax adjustment resulting from Agent Clemmons' changes was $1,220.89 (RT. 310). The difference between the Excise Tax Examination changes and the $1,400.80 additional excise tax levied against Taft is a result of the addition of interest.

Both the washed and unwashed coal in question was mined in the Warrior Basin coal field from the Pratt, America, Nickel Plate and Cob seams. Harry Raykes, Principal Mining Engineer for Southern Company Services, testifying as an expert witness, testified that these seams have been mined since the beginning of mining in Alabama (RT. 263). The seams cover an extensive area and have reasonably consistent bed moisture (RT. 264).[2] Based on Mr. Raykes' experience in the Warrior Basin coal field, it was Mr. Raykes' testimony that bed moisture in the seams in question would vary from

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[2] There was no evidence that this characteristic likely changed between 1980 and 1982.

1.75% to 2.75% with an average moisure of 2.25% (RT. 249, 264-265). Mr. Raykes also testified that he performed a study for Alabama Power Company of the reserves later mined by Taft (RT. 265). Based on this study, it was Mr. Raykes' opinion that the coal mined by Taft and involved in the audit in question had an average bed or inherent moisture of 2.25% (RT. 265).

Jack Davis of Tuscaloosa Testing testified that he analyzed core samples from the Taft mine in question for total moisture (RT. 195). Mr. Davis utilized test procedures prescribed by ASTM, which is a reasonable standard accepted in the coal industry (RT. 192-193, 279). The analysis of 123 samples resulted in an average total moisture of 2.30% (RT. 199; P.Ex. 20).

The samples taken by Mr. Davis were obtained from the same seams from which the coal in question was mined. However, the samples were taken from different sections of the mine, since the coal in question had already been mined and sold at the time the samples were taken (RT. 175, 181-185). Harry Raykes testified that the prior mining would not affect the average bed moisture of the unmined coal remaining in the area (RT. 272). Likewise, Mr. Raykes testified that the analysis on the remaining coal seams, performed by Jack Davis and Tuscaloosa Testing, would yield a reliable measure of the bed or inherent moisture of the coal involved in this case (RT. 271-272).

Coal lying in an undisturbed state contains inherent or bed moisture (P.Ex. 4, para. 2). The testimony of expert witnesses Raykes and Davis was to the effect that the Pratt, America, Nickel Plate, and Cobb seams are consistent in general with regard to bed moisture and could be expected to have an average bed moisture of 2.25% (RT. 200, 264). Test results performed by Tuscaloosa Testing of the specific coal seam in question showed an average total moisture of 2.30%. Bed moisture or inherent moisture is a component of total mois-

ture (RT. 256, 302). Reynold Shotts testified that Alabama coals contain, on the average, 2.88% inherent or bed moisture (P.Ex. 4). Taft utilized this average when calculating its Black Lung Tax (RT. 66). Taft reported washed coal based on a removal of all moisture including bed moisture.[3]

Harry Raykes and Dan Thornburgh testified that it is the custom and practice in the utility industry, both in Alabama and elsewhere, for coal purchases to be made on the basis of the BTU value of the coal (RT. 110, 282-284). Water has no BTU value (RT. 284). Accordingly, although it is always expected to be present in some quantity with coal delivered, a producer operating pursuant to a BTU contract does not profit financially by shipping water with coal (RT. 120-121, 127, 285). Water added to coal increases the apparent tonnage, but decreases the number of BTU's per ton (RT. 127, 285). Moreover, according to all definitions of coal before the court, water in excess of bed moisture or inherent moisture is not a part of the coal (RT. 281, 306; P.Ex. 4; Shotts' Stipulation).

The coal tonnages reported to the I.R.S. by Taft for Black Lung Tax purposes were determined by Alabama Power Company upon its receipt of the coal (RT. 59, 63-65). This is true whether the coal was sold on a washed or unwashed basis (RT. 111). Alabama Power Company samples each lot of coal received and performs an analysis of the sample (RT. 111, 114).[4] The results of the analysis performed on the coal in question are before the court in Plaintiff's Exhibits 6, 7, and 13.

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[3] Taft acknowledges that it was inconsistent for it to calculate Black Lung Tax for washed coal on a totally dry basis while calculating the same tax for unwashed coal on a dry coal plus inherent moisture basis.

[4] Washed coal was analyzed in a commingled status with coal produced by others.

CONCLUSIONS OF LAW[5]

The section of the Internal Revenue Code here involved is § 4121 (I.R.C. § 4121) which reads:

> (a) Tax imposed—There is hereby imposed on coal sold by the producer a tax at the rates of—
>
> (1) 50 cents per ton in the case of coal from underground mines located in the United States, and
>
> (2) 25 cents per ton in the case of coal from surface mines located in the United States.
>
> (b) Limitation on tax—The amount of the tax imposed by subsection (a) with respect to a ton of coal shall not exceed 2 percent of the price at which such ton of coal is sold by the producer.
>
> (c) Tax not to apply to lignite—The tax imposed by subsection (a) shall not apply in the case of lignite.
>
> (d) Definitions—For purposes of this subchapter—
>
> (1) Coal from surface mines—Coal shall be treated as produced from a surface mine if all of the geological matter above the coal being mined is removed before the coal is extracted from the earth. Coal extracted by auger shall be treated as coal from a surface mine.
>
> (2) Coal from underground mines—Coal shall be treated as produced from an underground mine if it is not produced from a surface mine.
>
> (3) United States—The term "United States" has the meaning given to it by paragraph (1) of section 638.
>
> (4) Ton—The term "ton" means 2,000 pounds.
>
> (e) Temporary increase in amount of tax—

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[5] The conclusions of law will be commingled with some ultimate findings of fact.

(1) In general—Effective with respect to sales after December 31, 1981, and before the temporary increase termination date—

(A) subsection (a) shall be applied—

(i) by substituting "$1" for "50 cents", and

(ii) by substituting "50 cents" for "25 cents", and

(B) subsection (b) shall be applied by substituting "4 percent" for "2 percent".

(2) Temporary increase termination date—For purposes of paragraph (1), the temporary increase termination date is the earlier of—

(A) January 1, 1996, or

(B) the first January 1 after 1981 as of which there is—

(i) no balance of repayable advances made to the Black Lung Disability Trust Fund, and

(ii) no unpaid interest on such advances.

Pursuant to I.R.C. § 4121, the Secretary of the Treasury has issued a Treasury Regulation which states:

Tonnage sold and sales price. For purposes of determining both the amount of coal sold by a producer and the sales price of the coal, the point of sale is f.o.b. mine, or f.o.b. cleaning point if the producer cleans the coal before selling it. This is true even if the producer sells the coal on the basis of a delivered price. Accordingly, f.o.b. mine or cleaning point is the point at which the number of tons sold is to be the applicable tonnage rate, and the point at which the sales price is to be determined for purposes of the tax under the 2 percent rate.

Treas.Reg. § 48.4121-1(d)(4).

This court has previously indicated that "[t]here is a certain implausibility to defendant's interpretation of the Regulation. . . ." *See* Memorandum Opinion filed May 18, 1983. The court, however, considered it appropriate to await a trial to "[e]stablish an adequate basis upon which to resolve a difficult question of statutory construction." *Bingham, Ltd. v. United States*, 724 F.2d 921 (11th Cir.1984).

The court has heretofore had two primary concerns with regard to interpretation of the statute and the regulation.

(1) Is it reasonable to broadly apply the term "coal" to include water which is not inherently a part of the mineral in its unmined state in the absence of a clear intention expressed in the statute or the regulation?

(2) Was there a reasonable basis *in this case* on which to determine the weight of the coal *sans* non-inherent moisture or water (excess water)?

The defendant elected to present no evidence at the trial, apparently relying on either the court finding plaintiff's evidence to be so tenuous as to not meet its burden or, in any event, to merely clearly establish the appropriateness of the defendant's application of the statute and regulation. The court did not find plaintiff's evidence to be tenuous with regard to the two primary concerns expressed above, and concludes that the plaintiff at least established an unrebutted basis *in this case* on which to determine the weight of the coal without including the weight of the excess water.

The court certainly does not fault the defendant for relying on the facts as developed during plaintiff's case in chief in asserting its primary position that: "The coal sold by the producer in this case is the gross tonnage delivered by Taft, not the net amount after any claimed moisture *deduction*. There is no language in the relevant statute or regulation which even suggests that such mois-

ture *deduction* can be taken." (emphasis added). *See* Defendant's Post-Trial Brief at 6.[6] For reasons which will be hereinafter discussed, the court cannot agree with its secondary argument that "[p]laintiff failed completely to establish that the claimed adjustments actually represented 'excess moisture.'" *Id.* at 6.

The court's initial factual concern was whether the 2.88% moisture calculation had a reasonable factual basis.[7] The evidence in support of this position was credible and not rebutted. Defendant did not take the position at the trial that the 2.88% figure is incorrect; only that *all* water weight should be included. (R.T. 176-177). Defendant *has* now argued that the figure should not be accepted because it is only an "approximation." The court finds that it is a reasonable percentage and is high for the coal which was being sold. To the extent that it is high, the defendant is advantaged. The court ultimately finds and concludes that plaintiff has satisfied the court by a preponderance of the evidence *in this case* that the "coal" here at issue had an inherent moisture content of 2.88% or less.[8] The court has not based this finding on the acceptance of the 2.88% figure by the

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[6] The parties acknowledged during the course of the hearings on the motion for summary judgment that the facts were relatively undisputed. Although it may be a matter of semantics, the court does not necessarily view plaintiff's reliance on Alabama Power Company's moisture calculations as taking a *deduction*. It may be better described as a method by which the amount of *coal* was determined.

[7] Inherent moisture has also been referred to as "bed moisture" and "equilibrium moisture." It is that moisture which naturally occurs in coal in its unmined state. Moisture which is not inherent is "free moisture," and would include surface water. "Equilibrium moisture" was defined by one witness as "The maximum amount of moisture that the coal itself can hold." Inherent moisture is tested by an equilibrium test.

[8] This finding is supported by the opinion of Professor Shotts attached to the stipulation.

State of Alabama. The court's acceptance of 2.88% is based on the undisputed evidence *in this case*. The evidence *was* consistent with Alabama's policy in severance tax collection.

Neither plaintiff nor defendant has cited to the court any cases which are directly apposite. The defendant has argued that the case of *Drummond Coal Company v. Watt*, CV82-H-1838-S (N.D.Ala.1983) supports its position. *Drummond*, however, was a case in which Judge Hancock was asked to declare invalid revised regulations promulgated by the Secretary of the Department of the Interior. These regulations governed a reclamation fee imposed by statute on coal produced in the United States. The regulations, as revised, clearly provided that "Impurities, including water, that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, shall not be deducted from gross weight." The question in *Drummond* was whether the regulation was arbitrary, capricious and inconsistent with the law.[9] There is no clear intent in § 48-4121-1(d)(4), as there was in the *Drummond* regulation, to tax water or any other "impurities."

In the instant case, there is no such clearly defined regulation. The court is called upon to interpret a statute and a regulation which make reference only to "coal." Whether the court does or does not agree with the decision in *Drummond* is immaterial. It is not applicable here.

Plaintiff has cited *Harrison Combs, et al. v. Sun-Up Coal Company, Inc.*, CV80-P-0126-J (N.D.Ala.1980) as being supportive of its position. In *Sun-Up*, Judge Pointer construed an agreement which required the defendant to make benefit payments to a union benefit plan and trust

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[9] The court assumes that the regulation involved in *Drummond* was adopted only after the Secretary met the usual requirements of the Administrative Procedures Act. This assumption is not necessary to the court's decision.

based on the number of tons of coal sold. Judge Pointer allowed the employer to exclude moisture from the tonnage amounts, saying that when adequate proof is made, a reduction, based upon loss resulting during the washing process and reduction for moisture content", was proper. Although *Sun-Up* involved the construction of a private agreement, it did involve the construction of similar language as that here under consideration.

Both plaintiff and defendant make the usual contradictory arguments concerning Congress's intent. The court will not attempt to bolster its own conclusions with sophistical arguments about legislative intent.[10] The court has based its ultimate conclusion on what appears to be the plain language of the statute and the regulation. *See Hanover Bank v. Commissioner of Internal Revenue*, 369 U.S. 672, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962). In the absence of clear Congressional intent and in the further absence of clear regulatory language, the court concludes that "coal" as used in the statute and the regulation does not include water which is excess to its inherent moisture content and which is reasonably measureable.

Defendant has argued: "Similarly, plaintiff not only failed to show the inherent moisture contained in the actual coal in dispute; it failed in the case of washed coal to show what the actual level of 'excess moisture' was. In the case of washed coal, coal from various producers was commingled after washing, with the result that there was no way to distinguish Taft's coal from other coals. (Transcript 26; 35; 41-42; 80; 94-95; 103-104; 131-132; 133; 135). Therefore, the plaintiff cannot even show that the moisture content determined by Alabama Power's analysis actually applied to Taft's coal.

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[10] The court does not detect any clear intent in the cited history. It is apparent that Congress was concerned with coal that can contribute to black lung disease and classified it accordingly.

Rather those tests merely resulted in an approximation or average. (Transcript 97; 100-101; 146-147; 148)."

The court finds and concludes that the amount of excess moisture was independently determined by Alabama Power Company in a commercially reasonable fashion. There was no evidence that the method used was irrational or that there is a more reasonable alternative method to determine the total moisture content. The court has not based its decision merely on the fact that water does not increase the coal's BTU content. The decision is based on a determination that "coal," by definition, does not include excess water. No expert testified that the term "coal" includes water in excess of its inherent moisture content.

The court ultimately finds and concludes that:

(1) Neither the statute nor the regulation can be reasonably interpreted to require the inclusion of water which is excess to inherent moisture content as being "coal," when the weight of the excess water can be reasonably ascertained and there is no clear statutory or regulatory language to the contrary; [11] and

(2) *In this case* there was a reasonable basis for determining the weight of the excess water.

The court will enter a judgment in favor of the plaintiff and against the defendant. Said judgment will allow for the recovery of any amounts paid as a result of including in the tonnage measurements, of both washed and unwashed coal, moisture in excess of 2.88%. There was perhaps some confusion as to how the plaintiff and/or the defendant made moisture calculations for the "washed" and "unwashed" coal. The proposed judgment should be consistent in including as a part of the "coal," the 2.88%.

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[11] There was no evidence, by expert opinion or otherwise, presented by defendant which would justify the *necessity* of a contrary interpretation.

Within one week after the filing of the Findings of Fact and Conclusions of Law, plaintiff will submit a proposed judgment. Defendant will have one week to file objections as to form.

ON APPLICATION FOR ATTORNEY FEES

This cause comes on to be heard on plaintiff's application for attorney fees under the provisions of 28 U.S.C. § 2412. This section provides for the award of attorney fees against the United States in any civil action brought by *or against* the United States *unless* the trial court finds that the position of the United States was "substantially justified" or that "special circumstances make an award unjust." "The burden of proving that a fee award should not be made rests with the government." *Enerhaul, Inc. v. N.L.R.B.*, 710 F.2d 748-750 (11th Cir. 1983). "The test of whether the Government position is substantially justified is essentially one of reasonableness." *Enerhaul, supra*, 710 F.2d at 750.[1]

The court notes that the facts of this case are essentially different from those in *Enerhaul*. In *Enerhaul*, the court held that the N.L.R.B.'s position in that case was unreasonable under the law of the Eleventh Circuit because of prior Fifth Circuit decisions. In this case, plaintiff never cited a case to this court which was clearly contrary to the position of the Government. On the other hand, the Government consistently maintained its position and ultimately relied upon a decision by another judge of this court. This court determined that the case of *Drummond Coal Company v. Watt*, No. CV82-H-1838-S (N.D.Ala.1983) was not decisive of this case. It does, however, contain language which would indicate that the Government was substantially justified in its position in this case. The *Drummond* court stated:

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[1] *Enerhaul* interpreted 5 U.S.C. § 504(a)(1) which uses similar language as found in 28 U.S.C. § 2412.

> Congress chose to tax tonnage of "coal." Obviously there are impurities mixed with coal—dirt, sulfur, water, etc. Congress made no attempt to remove from taxation this small percentage of impurities found in the mined coal. Had Congress been concerned that the inclusion of impurities would work an undue hardship on the coal operators, the tax could have been calculated in other ways. For example, Congress could have taxed the coal on its BTU content. Since Congress refused to distinguish coal from its impurities, the regulation requiring the inclusion of impurities in calculating gross weight at the time of initial sale, transfer, or use, is within the scope of the agency's authority. The fact that the impurities involved here are "added" to the coal after it is mined does not change the result. Again, Congress was well aware that after mining and before sale or use, coal is exposed to water from a variety of sources.

In this case, the ultimate result was to effectively tax the coal based on its BTU content. The language in *Drummond* would indicate that the Government was substantially justified in perceiving the intent of Congress with regard to § 4121.[2]

The Government's ultimate reliance on *Drummond* and its initial reliance on the rationale adopted in the *Drummond* case causes its position to pass the essential test of reasonableness.[3] The Government also relied upon Revenue Rulings which were not binding on this court.

The Government did not rely on a legal theory which "has been clearly and repeatedly rejected by this court."

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[2] *Drummond* was reversed in *Drummond Coal Co. v. Watt*, 735 F.2d 469 (1984) on jurisdictional grounds.

[3] There is a certain irony in plaintiff's argument that it spent over 400 hours in refuting a position that was not substantially justified. This was in addition to time spent by a party which filed an *amicus curiae* brief to oppose the Government's position.

While this court denied the Government's motion for summary judgment and indicated that there might be some question as to the merit of the Government's position, it also denied a request in briefs by the plaintiff for summary judgment. The court ultimately finds and concludes that there was a reasonable basis in fact and in law for the Government's position and that it was substantially justified. The application will be DENIED.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

Civil Action No. CV-80-P-0236-J

HARRISON COMBS, JOHN J. O'CONNELL, and
PAUL R. DEAN, as trustees of the United Mine Workers
of America Health and Retirement Funds,
Plaintiff,

vs.

SUN-UP COAL COMPANY, INC., a corporation,
Defendant.

[Filed Sept. 3, 1980]

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, at the United States District Courthouse, Jasper, Alabama, on the 12th day of August, 1980, commencing at 9:15 A.M., at which time the following proceedings, among others, were had and done:

APPEARANCES

Mr. William E. Mitch, of the firm of Cooper, Mitch and Crawford, 201 409 North 21st Street, Birmingham, Alabama, appearing for the Plaintiff.

Mr. Albert E. Ritchey, of the firm of Ritchey and Ritchey, Suite 405 11 West Oxmoor Road, Birmingham, Alabama, appearing for the Defendant.

August 12, 1980 9:15 A.M.

FINDINGS OF FACT—CONCLUSIONS OF LAW

THE COURT: I am prepared to enter findings and conclusions at this time.

The Court will now dictate into the record findings of fact and conclusions of law based upon the evidence presented in this case, and the issues as raised by the pleadings and the parties in pre-trial proceedings.

This case is essentially simple. It is a case by the Plaintiffs as trustees for health and retirement benefits under UMWA National Bituminous Coal Contracts of '74 and '78, seeking alleged underpayments by the Defendant, Sun-Up Coal Company, Incorporated, as contributions to the pension trust.

Under both the '74 and '78 agreements provision is made in Article 20, Section D for contributions by a signatory employer, such as Sun-Up Coal Company, based on two items: First, a certain rate based on tons of bituminous coal produced by the employer for sale or use, were acquired or obtained by a signatory employer for use or sale from sources other than signatory parties.

Secondly, there is a contribution based upon a rate per hour of work performed by employees who perform classified work.

Sun-Up Coal Company, for the period from June 8th, 1976, through July 31, 1979, made reports concerning the contributions it calculated to be due under the two bituminous agreements.

The trustees have caused to be made an audit concerning the accuracy of those reports. That audit has found that there was an understatement of contributions on a monthly basis, underpayments being made almost every month, and finding underpayments based not only on the reporting of hours worked by classified employees, but, primarily also in terms of the reporting of tons of bituminous coal produced.

In this particular situation the Defendant, Sun-Up Coal Company, Incorporated, is for our purposes simply a producer of coal, and not one which has acquired or obtained coal for non-signatory purposes.

The auditors have concluded, based upon the reports made by Sun-Up to it, on the basis of reports made by Sun-Up to State severance tax authorities, and based upon the failure of Sun-Up to document adequately any claim relating to certain losses and tonnage for rock or moisture, that there is owed by Sun-Up to the Trust Fund some sixty-five odd thousand dollars, that figure representing underpayments plus interest to November of 1979.

Additional interest, according to the Plaintiff, would be due for periods after November of 1979.

The Defendants have not in this cause challenged the accuracy of the audit as it relates to the reporting, or, underreporting of hours worked, nor has the Defendant challenged the accuracy of the audit as it relates to the number of tons of coal in a raw state produced by Sun-Up.

What Sun-Up has attempted here to do is to establish that the tons used by the auditors represented tons of coal in a raw state, that to obtain correct figures for tons of bituminous coal there must be a reduction first for loss due to a washing process, and in adjustment, which according to the defendant would be fifteen percent reduction, and that there should be a subsequent reduction of eight percent due to moisture content.

The Plaintiff has by evidence of its auditor indicated that such reductions, if adequately substantiated, would be correct, notwithstanding the fact that the coal sold by Sun-Up was being sold on a dollar rate per ton of raw, unwashed coal.

The basic difference insofar as the testimony given by Plaintiffs, and the position taken here by the Defendant relates to the failure of Sun-Up to have earlier documented its claim relating to washing loss and moisture content loss, as well as perhaps a question as to the suffi-

ciency of the proof even as presented here in the courtroom.

Counsel for Plaintiff apparently goes one step farther than that, asserting that since the coal was being sold on a raw tonnage basis, that that is determinative of the issue under the contract.

Counsel for Plaintiffs cites to the Court Lous v. Kerns, a District Court decision in 1959 in Indiana.

While there are some distinctions between this case and the Kerns' case, the Court rejects the basic reasoning of Kerns, and concludes that the auditors for the fund are correct in allowing, when adequate proof is made, a reduction, based upon loss resulting during a washing process, and reduction for moisture content.

There are basically two questions then, having resolved that legal issue essentially in favor of the Defendants.

First, there is the question as to who has the burden of proof in this matter, and when adequate documentation must be given if any reduction or credit is to be allowed.

It is my view that ultimately the burden of proof is upon the Plaintiff, the trustees, when they bring an action seeking to recover what they claim to be unpaid contributions under a contract.

On the other hand, as an evidentiary matter, whereas here the Plaintiffs, the trustees, have shown that the Defendant employer made reports based, or, including those to severance tax authorities on a raw tonnage basis, in my view this shifts to the employer the burden of coming forward with evidence to show that those, that its own figures are not accurate statements of the actual tons of bituminous coal, and must—and are due to be reduced in some specific way, meeting standards of general reasonable certainty.

I conclude, however, that it is not necessary for such documentation to have been made at the time of the audit.

I have searched through the bituminous agreements in question, and find no requirement that before someone can take a credit such as that, or challenge the accuracy

of figures calculated by the auditors, that they must have done so at the time of the audit, or be foreclosed from challenging the same.

And I think an employer under this agreement may, when used in court, raise at that time by competent evidence such challenges to the report of the auditors.

Obviously the auditors' report is prima facie proof of the amount of underpayments, particularly whereas here that report is based upon reports of the employer itself.

But, I do believe and conclude that the failure to have earlier documented any claim for loss due to washing or moisture content do not bar such a claim from being made here.

So, then, the second question relates to the sufficiency of the evidence presented before me as to any such claim of reduction for washing loss, or moisture content.

The evidence presented as consisted of testimony by a major purchaser from the Defendant of coal on a raw tonnage basis. That purchaser has regularly kept records relating to the tonnage loss accomplished during the washing process accomplished by it.

While those tonnage figures have been kept, not separately for tonnage purchased from this defendant, rather being kept on a basis in which purchases from this and other producers, as well as its own production, were consolidated for recordkeeping purposes, the Court is convinced that it nevertheless represents an adequate and satisfactory basis for making a determination of the amount of reduction by the washing process which would apply to the coal produced by this Defendant, Sun-Up.

This is not a question merely of sampling, where some samples have been taken, and then there is a project of those results forward.

Insofar as it appears at least during the period of time that most of the sales were being made by this Defendant, Sun-Up, to the Black Diamond Coal group, it appears that all of the coal so sold by this Defendant to the Black Diamond group was involved in the total

amount of coal which was being washed by the Black Diamond group, and on which records were being kept.

There is no basis, and indeed it would be, I think, an improper idea to conclude that the coal being presented by this Defendant, Sun-Up, at Black Diamond for washing was inferior in quality to the other coal which Black Diamond was washing, and indeed the witness from Black Diamond has indicated that there was no such basis or foundation for drawing such a conclusion, and that indeed it was not paying Sun-Up less per ton than others were being paid for unwashed raw coal presented at location.

Of perhaps particular significance is the fact that Sun-Up was in part producing coal on lands owned by the Black Diamond group, and not merely producing coal on lands leased from others.

This would give additional verification to the concept that the quality of coal in a raw state produced by Sun-Up for washing was at least comparable to the other coal which Black Diamond was accepting for washing and for resale.

Now, the Defendant, perhaps in an abundance of caution, has not applied the reduction figures of first fifteen percent, and then later eight percent to all of the tonnage of raw tons during this period of June, 1976, into the end of July, 1979.

Instead, since nine hundred and sixty-six point fifteen tons were apparently sold or supplied directly to railroad vehicles, only an eight percent reduction was applied to those tons rather than the twenty-one point eight percent reduction applied to the balance of the tonnage during that period.

Apparently the reason for that as given by the CPA hired by the Defendant was the failure to have independent documentations as to that nine hundred and sixty-six tons.

I think, however, it would be fallacious to assume that those nine hundred and sixty-six tons were any different

in the way they ought to be treated than the other eighty-two thousand tons, and they should, in my judgment, be treated as comparable to the other eighty-two thousand tons insofar as the expectancy of loss in connection with impurities that would be removed by washing, as well as those dealing with moisture content.

I have therefore taken the figures provided by the Defendant's testimony and concluded that additional adjustment or reduction should be made with respect to those nine hundred and sixty-six tons by changing the reduction from eight percent reduction to a reduction of twenty-one point eight percent for those nine hundred and sixty-six tons.

I conclude that this would, at the rate of a dollar thirty-eight and-a-half cents applicable during that particular period of time, cause a further reduction in the amount calculated by the Defendant's expert.

According to my calculations, and prior to the question of any interest being added, which will be proper, the amount underpaid and owing is thirty-six thousand seven hundred and eight dollars and sixty-five cents.

There should be added to this figure interest at the rate of six percent from the dates the same were due.

I have not attempted to go through month-by-month, particularly since I had no calculator in front of me to do this, to calculate the monthly interest figures that would be due.

I would take it, however, that the parties should have no difficulty in making that type of interest calculation, understanding that what I have done is essentially adopt the report of the Defendant's witness with the additional adjustments described for the months of March, June and July, 1979.

The trustees are due an attorney's fee in this case in addition to the recovery of this amount of underpayment.

In connection with motions submitted to the Court it was indicated that, as I understand it, a claim was being

made, at least at that time, for an attorney's fee in the amount of six hundred dollars.

I do not know—and, of course, there would be taxed against the Defendant the cost of this action.

I do not know, Mr. Mitch, whether that claim for six hundred dollars is being adjusted by reason of the fact that this case has gone to trial rather than being determined by summary judgment motion.

MR. MITCH: No, sir. It was as of the date of the motion.

THE COURT: Then, there would be, I take it, a claim for additional time spent today in connection with this case, the trial of it?

MR. MITCH: Yes, sir.

THE COURT: Unless there is objection at this point by the Defendant, the Court will conclude that a total award of attorneys' fees in connection with this litigation in favor of Mr. Mitch as counsel for the Plaintiffs will be one thousand dollars.

Is there objection by the Defendant to that amount such as to call for the reception of evidence on the claim?

MR. RITCHEY: There is no objection, Your Honor.

THE COURT: All right. There will be one thousand dollars attorneys' fee. Cost will be taxed against the Defendant.

And the Plaintiff shall have and recover of the Defendant thirty-six thousand seven hundred and eight dollars and sixty-five cents, plus interest, at the rate of six percent, from the respective due dates until paid.

Let me stop at this point, and certainly without asking the Plaintiff in any way to agree with the findings of fact that I have made, or the conclusions of law, ascertain if I have failed to make any factual finding that I should, or perhaps misstated something inadvertently during the course of this dictation that should be corrected, or, if there is any confusion about what the Court has actually ruled.

I'm not asking for any waiver of the right to disagree, or the right to appeal certainly, but, I'm just seeing if there are any clarifications that are needed at this point.

MR. MITCH: No, sir.

MR. RITCHEY: No, sir. I think you covered it very well.

MR. MITCH: As close as I could. I naturally don't agree, but—

THE COURT: Sure. I believe, although I did not have a calculator in front of me, that I have accurately done the mathematics consistent with the principles that I was addressing.

Now, I would be happy to meet briefly with counsel or their experts and see if there is a problem over my mathematical calculations on that point, and perhaps it would be well to make a brief calculation before the parties leave so that if there is—

MR. MITCH: I'm not sure that Mr. McCleery can make that quick, the monthly thing, but, we will make them.

THE COURT: Well, I'm not talking about monthly interest figures.

MR. MITCH: I understand.

THE COURT: Well, I can show you how I have done my adjustments, and I think it's very easy to do.

If there's nothing else, why don't we stop at this point, and perhaps counsel could come into chambers and I will show you what I have done insofar as the calculations, counsel and the accountant.

(WHEREUPON, there was an off-the-record discussion in chambers.)

END OF PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CV86-H-245-S

A. J. TAFT COAL CO., INCORPORATED,
Plaintiff,

vs.

JOSEPH P. CONNORS, SR., *et al.*, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, ETC.,
Defendants.

CV86-H-724-S

JOSEPH P. CONNORS, SR.; *et al.*;
Plaintiffs,

vs.

DRUMMOND COMPANY, INC.;
ALABAMA BY-PRODUCTS CORPORATION;
Defendants.

[Filed June 18, 1986]

MEMORANDUM OF DECISION AND ORDER

A. J. Taft Coal Company, Inc. (Taft) commenced CV86-H-245-S against Joseph P. Connors, Sr., and others, as trustees of several funds of the United Mine Workers of America Funds (the Funds or the Trustees).

In its complaint, Taft alleged a plaintiff class comprised of all the Alabama coal companies who are or have been signatories to the National Bituminous Coal Wage Agreement (NBCWA) and who, pursuant to that agreement, have calculated and paid their contributions to the Funds based on the weight of coal produced exclusive of extraneous moisture. The defendants asserted in their answer a counterclaim based on 29 U.S.C. § 1132 and § 1145, demanding that as of October 24, 1985, plaintiffs pay contributions to the Funds based on the weight of the coal produced with no deduction for extraneous moisture.

The Trustees then moved to transfer the action to the United States District Court for the District of Columbia, where the Trustees had previously filed suit against three other Alabama coal companies. That motion was denied on March 10, 1986, and the court set this case for final hearing on May 6, 1986. In lieu of that hearing, the parties filed cross motions for summary judgment. The parties have submitted briefs and documentary evidence in support of the motions and those motions are before the court for a ruling.

Along with the summary judgment motions in CV86-H-245-S, the court will necessarily and simultaneously consider and resolve similar issues presented by a motion for summary judgment in CV86-H-724-S. The latter case was severed from *Connors v. Island Creek Coal Co., Drummond Coal Co. and Alabama By-Products Corp.* and transferred from the District Court of the District of Columbia as the result of a stipulation between the plaintiffs and defendants on April 11, 1986. (Prior to the severance and transfer by Judge Revercombe in Washington, Drummond and Alabama By-Products filed notices of intervention in CV86-H-245-S on March 12, 1986). In *Connors v. Drummond and Alabama By-Products*, the Trustees seek declaratory and injunctive relief in relation to the defendant coal producers' contributions to the Funds. No party having responded to the April

22, 1986 order relating to consolidation, these two actions are ORDERED consolidated.

As the balance of this memorandum reflects, the issues in CV86-H-724-S are subsumed by those addressed in CV86-H-245-S; and for the reasons and against the factual background set forth below, the court concludes that the seminal issue in these two cases has already been resolved in a previous decision rendered by this court in 1980.

The undisputed evidence submitted in support of the motions shows that Taft has been a signatory to each NBCWA since 1971. These agreements are negotiated by the signatories and the United Mine Workers; the Funds do not participate in negotiations nor make recommendations to the parties to the NBCWA. The wage contracts are renegotiated roughly every three years. The last NBCWA, construed here, was signed in 1984. Since Taft became a signatory in 1971, there have been no significant changes in the contract terms governing the method by which employer signatories compute their contributions to the Funds. The pertinent portion of the agreement, Article XX, Section (d)(1), reads:

> Section (d) Contributions by Employers
>
> (1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by each Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts referred to in this Article the amounts specified below based on cents per hours worked by each of the Employer's Employ-

ees who perform classified work under this Agreement.

BCOA may elect to change or convert the cents per ton basis of funding contained herein to a different method of funding so long as such alternate method produces the equivalent contribution to that provided herein on a cents per ton basis. It is further understood that if such election is exercised all references to cents per ton contributions or obligations arising therefrom in this Article shall be read as to reform such references to the appropriate method of funding.

The language requiring employer contributions based on "tons produced . . . for use or for sale" was included in the 1946 NBCWA, which created the UMW Welfare and Retirement Fund. Resolution of this case turns upon the interpretation of that language as it appeared in the 1984 agreement.

Since 1980, Taft has made its monthly contributions to the Funds according to the results of two separate calculations, as required by the NBCWA. Part of the contribution, which is not at issue here, is determined according to the number of hours worked by the signatory's employees performing classified work. The remainder of the required payment has been calculated using the tons of coal produced for use or sale, i.e., the tonnage after it has been processed or washed to whatever extent is required by the contract governing its sale, or to the extent required for the producer's own use. The "tons produced" figure is derived through laboratory analyses to determined what percentage of the total weight of the coal is actually water. Taft then subtracts 2.88% from the moisture percentage figure to arrive at the so-called moisture deduction. The moisture deduction, representing the percentage of extraneous (as opposed to inherent) moisture in the coal as sold, is not included in the amount of total tonnage used to compute the contribution. Extra-

neous moisture is moisture over and above that inherent in the coal, whereas inherent moisture is part of the coal as it lies in the ground. It is undisputed that coal picks up additional water from rain, the washing process and atmospheric moisture, among other sources, and it is this additional water (and its weight) which is at the heart of these cases.

The genesis of Taft's moisture deduction occurred when the Alabama Department of Revenue promulgated regulations allowing coal producers to adjust their tonnage for extraneous moisture when figuring certain state taxes. The regulations provide that coal is deemed to have a standard inherent moisture content of 2.88%. After these regulations were published, Taft began deducting all moisture in excess of 2.88% from its total tonnage. Some other Alabama producers began taking a moisture deduction in the 1970s. At that time, however, the percentage of moisture deemed inherent was not standardized; some producers used a 2.5% inherent moisture figure, others used 2.88%, others used 1.5%, etc. Neither of the auditors who have periodically reviewed Taft's books since the Funds began an auditing program in 1978 were ever told to disallow the moisture deduction *per se*. As long as the coal producer could document the moisture content with, e.g., laboratory analyses, the Funds allowed contributions to be paid based on the adjusted tonnage.

Outside of Alabama, only two other signatory coal companies have been allowed to take a deduction for extraneous moisture. Colorado Fuel and Iron (CF&I) was audited in 1980 and attempted at that time to take a deduction for all moisture in the coal. CF&I claimed that it dried its coal to zero per cent moisture prior to sale. Though the Funds did not allow this total moisture deduction, it did allow CF&I to deduct all moisture in excess of 1%. Furthermore, the Funds informed CF&I that if the company could document its claim that it dried the

coal to zero moisture, it would be allowed to deduct the 1% as well. CF&I never produced documentation to substantiate its claim.

In 1981, the Funds also allowed Bailey Mining Company of Bypro, Kentucky, to deduct a "reject" percentage for ash content and excess moisture in all coal produced after April 1, 1979. However, in a subsequent audit conducted in 1983, the Funds refused to allow any ash or moisture deduction. Bailey has never paid the sums due for the deductions it took; it ceased mining operations in November, 1983.

Also in 1983, the Pittsburgh-Midway Coal Company in Colorado informed a Funds officer that Pittsburgh-Midway management had considered taking a moisture deduction because it was common knowledge in the industry that Alabama coal companies were doing so. The United States Steel, which bought an Alabama mine in 1984, having operated several mines in other states, inquired in 1984 as to whether all its coal producing facilities would be able to take the same moisture deduction as its Alabama producers. This prompted the Trustees to consider the inconsistency in its policy with regard to the moisture deduction. As a result of that reconsideration, the Trustees mailed a letter, dated October 24, 1985, to all signatories expressly denying any allowance of a moisture deduction for all contributions due after that date. The Trustees' letter asserted that the language in the NBCWA does not contemplate any deduction for moisture.

The Trustees have already engaged in litigation in the Northern District of Alabama over the amount of contribution due from an Alabama producer and the effect of extraneous moisture on that amount. In 1980, Judge Pointer decided *Combs v. Sun-Up Coal Co.*, No. CV80-P-236-J (N.D.Ala. Aug. 12, 1980). In that case, the Trustees sought monetary recompense for underpayments by

Sun-Up Coal Co. into the UMW pension trust for the period June 8, 1976 through July 31, 1979. Though the litigation resulted in a judgment against Sun-Up for underpayments to the pension trust, the court in its Findings of Fact and Conclusions of Law determined that it was appropriate for the coal producer to take a deduction for excess moisture. Since the date of that decision, Taft and the other Alabama signatories have, with proper documentation, adjusted their reported tonnage for extraneous moisture.

Subsequent to the *Sun-Up* ruling, the UMWA and defendants entered into successive wage agreements in 1981 and 1984. The language governing contributions to the Funds remained the same even though producers inside and outside Alabama, as well as Funds' officials, were by now well aware of the inconsistent implementation of the moisture policy. There was no further conflict over the deduction until October 24, 1985, when the Trustees sent the letter mentioned above which stated:

> It has recently come to the attention of the Funds' Trustees that certain coal producers, in computing the tonnage upon which contributions are based, have taken deductions for moisture in excess of the amount of moisture inherent in coal in its natural state. Such deductions are contrary to the terms of the Coal Wage Agreement . . . . [P]lease be advised that the calculation of tonnage contributions due to the Funds must be based upon the actual weight of the coal product without regard to the moisture content of the coal.

The letter advised employers that contributions remitted based on tonnage adjusted for moisture would be considered deficient.

Before addressing the contentions of the parties in regard to the main issue, the court will first address the propriety of Taft's allegation of a class of Alabama coal

producers. Though they denied the propriety of maintaining this suit as a class action in their answer, the Trustees have not, in subsequent motions, arguments or briefs, further objected to the class.

The court finds that this action is eminently suited to Federal Rules of Civil Procedure 23(b)(2) status, as the Trustees have clearly "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FRCP 23(b)(2). Furthermore, the prerequisites to a class action outlined in Rule 23(a)(2, 3 and 4) are so clearly fulfilled as not to merit discussion. Generally, the question of whether the numerosity requirement of Rule 23(a)(1) has been met is left to the discretion of the trial court; there are no arbitrary rules by which numerosity should be established. *Garcia v. Gloor*, 609 F.2d 156, 160 (5th Cir. 1980). Smaller classes should be more readily certified when the relief sought is injunctive and and will benefit a future class of indefinite size. *See Young v. Pierce*, 544 F.Supp. 1010 (D.C. Tex. 1982).

Answers submitted by the Trustees to Taft's interrogatories indicate that there are or were thirty Alabama coal companies who were known to have taken the moisture deduction at the times they were audited between 1973 and 1985. (There is no evidence nor a suggestion that any of these companies *voluntarily* ceased to claim the deduction prior to the filing of this suit.) As there has been no serious objection to Taft's representation of these companies as a class, and as their joinder under the circumstances would unduly delay and complicate the decision in this case, the court ORDERS the putative class as alleged in Taft's complaint certified as a plaintiff class.

The Trustees insist that the propriety of a moisture deduction under the 1974 and 1978 wage agreements was not litigated in *Sun-Up*, so that the decision in that

case is not binding on them or on this court in interpreting the "tons produced for use or for sale" language in the identical clause of the 1984 NBCWA. However, the decision in *Sun-Up* reflects that Judge Pointer considered and expressly rejected the proposition that the signatory defendant should be denied a moisture deduction. Judge Pointer observed that the Trustees' auditors had indicated that reductions for losses incurred in the washing process as well as an 8% moisture reduction would be "correct," and went on to say that the basic conflict in the testimony and positions of the parties related "to the time at which Sun-Up documented those deductions."

Significantly, Judge Pointer continued his synopsis of the arguments before the court to say that, "Counsel for [Trustees] apparently goes one step farther, asserting *that since the coal was being sold on a raw tonnage basis, that that is determinative of the issue under the contract.*" (Emphasis added.) He then discussed *Lewis v. Kerns*, 175 F.Supp. 115 (S.D. Ind. 1959), cited by the Trustees in support of their argument against a moisture deduction. He expressly rejected "the basic reasoning of *Kerns*" and concluded that the Funds' auditors were "correct in allowing, when adequate proof is made, a reduction, based upon loss resulting during a washing process, and reduction for moisture content." He went on, "[t]here are basically two questions then, *having resolved that legal issue essentially in favor of the defendants.*" (Emphasis added.) The quoted language from the *Sun-Up* decision, which the Trustees did not appeal, leads this court to the firm conclusion that it would be improper to hold today that the moisture deduction issue before it has not already been litigated by the Trustees under the current contract language and resolved against the Trustees.

The Trustees' evidentiary presentation includes the affidavit of Larry Cradic, Field Audit Supervisor for the Funds, in which he states his "understanding" that the

issues litigated in *Sun-Up* did not include the issue of whether it was proper under the NBCWA for Alabama producers to take a moisture deduction. Cradic's assertion does not aid the Trustees' position for two reasons. First, the affidavit on its face shows that the affiant has no personal knowledge of the matters litigated. See FRE 602. Cradic merely sates that it is "[his] understanding" that *Sun-Up* dealt with whether Sun-Up's coal had been cleaned and whether there was sufficient documentation. The defendants have produced no other evidence to show that Cradic does have the requisite personal knowledge of the *Sun-Up* case. Second, Cradic's assertion directly contradicts the plain language in Judge Pointer's opinion.

Having decided that the issue before the court has been the subject of an earlier and binding decision, it is clear that relitigation of the moisture deduction issue is precluded. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the Eleventh Circuit stated in *Hart v. Yamaha-Parts Distributors, Inc.*, (slip op. 3204 April 28, 1986, at 3207, the doctrine of collateral estoppel precludes "relitigation of a matter that has been litigated and decided," (quoting *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77, n.1 [1984]). The prerequisites to the application of collateral estoppel are that (1) the issue at stake in the present litigation must be identical to the one in the prior litigation; (2) the issue must have been actually litigated in the prior case; (3) determination of the issue must have been a "critical and necessary part of the judgment in that earlier action," and (4) the party against whom collateral estoppel is asserted "must have had a full and fair opportunity to litigate the issue in the earlier proceeding." *Id.* (quoting *Greenblatt v. Drexel Burnham Lambert*, 763 F.2d 1352, 1360 [11th Cir. 1985]). Furthermore, issue preclusion is not limited to parties and their privies, but may be available to a defendant who was not a party to the first action. *See Hart* at 3207.

As the decision of Judge Pointer shows, the four prerequisites have been met here. Certainly the Trustees had "a full and fair opportunity" to litigate the moisture deduction in *Sun-Up*, for in that case they were the party plaintiff and, as in this case, stood to lose a significant amount in contributions to the Funds.

The Trustees argue that *Parklane Hoisery Co. v. Shore*, 439 U.S. 322 (1979) dictates that collateral estoppel should not be applied here. *Parklane* taught that offensive collateral estoppel should not be applied to bar litigation of an issue if such application would be unfair to the defendant. Again, there are two flaws in the Funds' argument, as the application of issue preclusion in this case is neither unfair nor purely offensive.

The amount at stake in *Sun-Up* was admittedly less than that represented by this declaratory action. However, there is no evidence before the court as to how much greater the judgment would have been if the moisture deduction issue had been decided in favor of the Funds. That difference, and not the amount of the judgment for the Trustees, would be the crucial figure if this court were to use the amount at stake as an indication of whether the moisture deduction has been fully litigated. The Trustees' contention is basically that it is unfair to hold them to the prior decision because *Sun-Up* involved only one, as opposed to all, Alabama signatories. Nonetheless, the court is not convinced of that unfairness primarily because the Trustees must, at that time, have recognized the import on the interpretation in *Sun-Up* and, if they wished to alter their practice with regard to the Alabama companies, should have appealed the decision and/or instigated the renegotiation of the issue in subsequent wage agreements. Unlike many private litigants, they undoubtedly had the resources to do so.

The posture of this case is such that it is not a truly offensive application of issue preclusion. Taft and its fellow class members seek declaratory relief only in re-

action to the Trustees' notice that the latter were planning unilaterally to change a practice that has gone unquestioned for at least ten years. Furthermore, the Trustees seek in their cross motion for summary judgment to recover on their counterclaim for the difference between contributions with and without the moisture deduction. The counterclaim, at least, puts the plaintiffs in the position of using *Sun-Up* defensively.

Since *Sun-Up* was decided in 1980, the UMW and coal producers have executed two subsequent coal wage agreements containing exactly the same language with regard to the coal tonnage on which contributions are paid. The Trustees, through the auditing process, have openly and consistently treated Alabama producers in a different manner than other producers who were signatory to the same contractual language. The Trustees have been well aware for nearly six years that, given past practice under identically worded contracts, the moisture deduction was properly taken by the plaintiffs. If they wish now to have this practice altered, the only appropriate way to do so is to see that it is bargained for in future NBCWA negotiations. This court cannot, in the face of the *Sun-Up* precedent, change the contract for them.

An appropriate final judgment will be entered.

DONE this 18th day of June, 1986.

/s/ James H. Hannah
United States District Judge

SUBCHAPTER IV—ABANDONED MINE RECLAMATIONS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 1211, 1253 of this title.

§ 1231. Abandoned Mine Reclamation Fund

(a) Establishment; administration; State funds

There is created on the books of the Treasury of the United States a trust fund to be known as the Abandoned Mine Reclamation Fund (hereinafter referred to as the "fund") which shall be administered by the Secretary of the Interior. State abandoned mine reclamation funds (State funds) generated by grants from this subchapter shall be established by each State pursuant to an approved State program.

(b) Sources of deposits to fund

The fund shall consist of amounts deposited in the fund, from time to time derived from—

(1) the reclamation fees levied under section 1232 of this title: *Provided*, That an amount not to exceed 10 per centum of such reclamation fees collected for any calendar quarter shall be reserved beginning in the first calendar year in which the fee is imposed and continuing for the remainder of that fiscal year and for the period in which such fee is imposed by law, for the purpose of section 1257(c) of this title, subject to appropriation pursuant to authorization under section 1302 of this title: *Provided further*, That not more than $10,000,000 shall be available for such purposes;

(2) any user charge imposed on or for land reclaimed pursuant to this subchapter after expenditures for maintenance have been deducted;

(3) donations by persons, corporations, associations, and foundations for the purposes of this subchapter; and

(4) recovered moneys as provided for in this subchapter.

(c) Use of moneys

Moneys in the fund may be used for the following purposes:

(1) reclamation and restoration of land and water resources adversely affected by past coal mining, including but not limited to reclamation and restoration of abandoned surface mine areas, abandoned coal processing areas, and abandoned coal refuse disposal areas; sealing and filling abandoned deep mine entries and voids; planting of land adversely affected by past coal mining to prevent erosion and sedimentation; prevention, abatement, treatment, and control of water pollution created by coal mine drainage including restoration of stream beds, and construction and operation of water treatment plants; prevention, abatement, and control of burning coal refuse disposal areas and burning coal in situ; and prevention, abatement, and control of coal mine subsidence;

(2) for use under section 1236 of this title, by the Secretary of Agriculture, of up to one-fifth of the money deposited in the funds annually and transferred by the Secretary of the Interior to the Secretary of Agriculture for such purposes;

(3) acquisition and filling of voids and sealing of tunnels, shafts, and entryways under section 1239 of this title;

(4) acquisition of land as provided for in this subchapter;

(5) enforcement and collection of the reclamation fee provided for in section 1232 of this title;

(6) studies by the Department of the Interior by contract to such extent or in such amounts as are provided in appropriation Act with public and private organizations to provide information, advice, and technical assistance, including research and demonstration projects, conducted for the purposes of this subchapter;

(7) restoration, reclamation, abatement, control, or prevention of adverse effects of coal mining which constitutes an emergency as provided for in this subchapter;

(8) grants to the States to accomplish the purposes of this subchapter;

(9) administrative expenses of the United States and each State to accomplish the purposes of this subchapter; and

(10) all other necessary expenses to accomplish the purposes of this subchapter.

(d) Moneys available upon appropriation; no fiscal year limitation

Moneys from the fund shall be available for the purposes of this subchapter, only when appropriated therefor, and such appropriations shall be made without fiscal year limitations.

(Pub. L. 95-87, title IV, § 401, Aug. 3, 1977, 91 Stat. 456.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1236, 1291, 1302 of this title.

§ 1232. Reclamation fee

(a) Payment; rate

All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of

the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine or 10 cents per ton, whichever is less.

(b) Due date

Such fee shall be paid no later than thirty days after the end of each calendar quarter beginning with the first calendar quarter occurring after August 3, 1977, and ending fifteen years after August 3, 1977, unless extended by an Act of Congress.

(c) Submission of statement

Together with such reclamation fee, all operators of coal mine operations shall submit a statement of the amount of coal produced during the calendar quarter, the method of coal removal and the type of coal, the accuracy of which shall be sworn to by the operator and notarized.

(d) Penalty

Any person, corporate officer, agent or director, on behalf of a coal mine operator, who knowingly makes any false statement, representation or certification, or knowingly fails to make any statement, representation or certification required in this section shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or both.

(e) Civil action to recover fee

Any portion of the reclamation fee not properly or promptly paid pursuant to this section shall be recoverable, with statutory interest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts.

(f) Cooperation from other agencies

All Federal and State agencies shall fully cooperate with the Secretary of the Interior in the enforcement of this action.

(g) Allocation of funds

(1) The geographic allocation of expenditures from the fund shall reflect both the area from which the revenue was derived as well as the national program needs for the funds.

(2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this subchapter. Where the Governor of a State or the head of a governing body of a tribe certifies that (i) objectives of the fund set forth in section 1233 and 1239 of this title have been achieved, (ii) there is a need for construction of specific public facilities in communities impacted by coal development, (iii) impact funds which may be available under provisions of the Federal Mineral Leasing Act of 1920, as amended [30 U.S.C. 181 et seq.], or chapter 69 of title 31, are inadequate for such construction, and (iv) the Secretary concurs in such certification, then the Secretary may continue to allocate all or part of the 50 per centum share to that State or tribe for such construction: *Provided, however,* That if funds under this subparagraph (2) have not been expended within three years after their allocation, they shall be available for expenditure in any eligible area as determined by the Secretary.

(3) The balance of funds collected on an annual basis may be expended in any State at the discretion of the Secretary in order to meet the purposes of this subchapter. Such funds may be expended directly by the Secretary or by making additional grants to approved State reclama-

tion programs pursuant to section 1235 of this title when the Secretary finds that such programs are the best means of accomplishing the specific reclamation projects. The Secretary shall consult and coordinate with the respective States those projects funded directly or in conjunction with other Federal agencies.

(Pub. L. 95-87, title IV, § 402, Aug. 3, 1977, 91 Stat. 457.)

REFERENCES IN TEXT

The Federal Mineral Leasing Act of 1920, as amended, referred to in subsec. (g)(2), probably means the Mineral Leasing Act of 1920, act Feb. 25, 1920, ch. 85, 41 Stat. 437, as amended, which is classified principally to chapter 3A (§ 181 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 181 of this title and Tables.

CODIFICATION

In subsec. (g)(2), "chapter 69 of title 31" was substituted for "the Act of October 20, 1976, Public Law 94-565 (90 Stat. 2662) [31 U.S.C. 1601 et seq.]" on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1231, 1235, 1239 of this title.

§ 870.12 Reclamation fee.

(a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.

(b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

(1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit.

(2) The value of the coal shall be determined F.O.B. mine.

(3) The weight of each ton shall be determined by the actual gross weight of the coal.

(i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

(ii) Operators selling coal on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction.

(iii) Insufficient records shall subject the operator to fees based on raw tonnage data.

(c) If the operator combines surface mined coal, including reclaimed coal, with underground mined coal before the coal is weighed for fee purposes, the higher reclamation fee shall apply, unless the operator can substantiate the amount of coal produced by surface mining by acceptable engineering calculations or other reports which the Director may require.

§ 700.5 Definitions.

As used throughout this chapter, the following terms have the specified meaning except where otherwise indicated—

Act means the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87).

Anthracite means coal classified as anthracite in ASTM Standard D 388-77. Coal classifications are published by the American Society of Testing and Materials under the title, *Standard Specification for Classification of Coals by Rank*, ASTM D 388-77, on pages 220 through 224. Table 1 which classifies the coals by rank is presented on page 223. This publication is hereby incorporated by reference as it exists on the date of adoption of these regulations. Notices of changes made to this publication will be periodically published by the Office of Surface Mining in the FEDERAL REGISTER. This ASTM Standard is on file and available for inspection at the OSM Office, U.S. Department of the Interior, South Interior Building, Washington, D.C. 20240, at each OSM Regional Office, District Office and Field Office, and at the central office of the applicable State Regulatory Authority, if any. Copies of this publication may also be obtained by writing to the above locations. A copy of this publication will also be on file for public inspection at the Federal Register Library, 1100 L St., N.W., Washington, D.C. Incorporation by reference provisions approved by the Director of the FEDERAL REGISTER February 7, 1979. The Director's approval of this incorporation by reference expires on July 1, 1981.

Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of "anthracite" immediately above.

Department means the Department of the Interior.

Director means the Director, Office of Surface Mining Reclamation and Enforcement, or the Director's representative.

Federal lands means any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands. However, lands or mineral interests east of the 100th meridian west longitude owned by the United States and entrusted to or managed by the Tennessee Valley Authority are not subject to sections 714 (surface owner protection) and 715 (Federal lessee protection) of the Act.

Federal lands program means a program established by the Secretary pursuant to section 523 of the Act to regulate surface coal mining and reclamation operations on Federal lands.

Fund means the Abandoned Mine Reclamation Fund established pursuant to section 401 of the Act.

Indian lands means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

Indian tribe means any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

Office means the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act.

Person means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any

agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal, State or local government.

Person having an interest which is or may be adversely affected or *person with a valid legal interest* shall include any person—

(a) Who uses any resource of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority; or

(b) Whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority.

Public office means a facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

Regional Director means a Regional Director of the Office or a Regional Director's representative.

Regulatory authority means the department or agency in each State which has primary responsibility at the State level for administering the Act in the initial program, or the State regulatory authority where the State is administering the Act under a State regulatory program, or the Secretary in the initial or permanent program where the Secretary is administering the Act, or the Secretary when administering a Federal program or Federal lands program or when enforcing a State program pursuant to section 521(b) of the Act.

Regulatory program means any approved State or Federal program or, in a State with no approved State or Federal program and coal exploration and surface coal

mining and reclamation operations are on Federal lands, the requirements of Subchapters A, F, G, J, K, L, M, and P of this chapter.

Secretary means the Secretary of the Interior or the Secretary's representative.

State regulatory authority means the department or agency in each State which has primary responsibility at the State level for administering the initial or permanent State regulatory program.

Surface coal mining operations means—

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in-situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. *Provided*, these activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to section 512 of the Act; and, *Provided further*, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is

incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

Ton means 2000 pounds avoirdupois (.90718 metric ton).

[44 FR 15313, Mar. 13, 1979; 44 FR 49684, Aug. 24, 1979, as amended at 45 FR 54753, Aug. 18, 1980; 48 FR 6934, Feb. 16, 1983; 48 FR 20400, May 5, 1983; 50 FR 28189, July 10, 1985]

RULES AND REGULATIONS

In consideration of the comments received and pursuant to the authority of sections 201(c) and 402 of the Surface Mining Control and Reclamation Act of 1977, 30 CFR Chapter VII is amended by adding a new Part 837, to read as follows:

Sec.

837.1 Scope.

837.2 Objectives.

837.3 Responsibility.

837.5 Definitions.

837.11 Applicability.

837.12 Reclamation fee.

837.13 Fee computations.

837.14 Determination of percentage based fees.

837.15 Reclamation fee payment.

837.16 Production records.

AUTHORITY: Sec. 201, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201).

§ 837.1 Scope.

This part sets out the procedures for the collection of fees for the Abandoned Mine Reclamation Fund (fund).

§ 837.2 Objectives.

The objectives of this part are to establish—

(a) Methods for determining the reclamation fee payable on coal production.

(b) Procedures for paying the reclamation fee to the Director.

(c) Requirements for production recordkeeping and reporting.

§ 837.3 Responsibility.

(a) The Secretary of the Interior administers the fund.

(b) The Director, under the general direction of the Assistant Secretary, Energy and Minerals, is responsible for administering the provisions of this part.

§ 837.5 Definitions.

As used in this part—

Anthracite, bituminous and subbituminous coal means all coals other than lignite coal.

Calendar quarter means a 3-month period within a calendar year. The first calendar quarter begins on January 1 of a calendar year and ends on the last day of March. The second calendar quarter begins on the first day of April and ends on the last day of June. The third calendar quarter begins on the first day of July and ends on the last day of September. The fourth calendar quarter begins on the first day of October and ends on the last day of December.

Fee compliance officer means any person authorized by the Secretary to exercise his authority in matters relating to this part.

In situ coal mining means the process of recovering energy from coal in its natural geological location by igniting the coal seam and recovering the gas at the wellhead.

Lignite coal means consolidated lignitic coal having less than 8,300 British thermal units per pound, moist, and mineral-matter-free. British thermal units per pound, moist and mineral-matter-free, are determined by Parr's formula, page 213, equation 3, D-388 (reapproved

1972), Part 26, 1976 Annual Book of ASTM Standards as follows:

Moist, Mm-free Btu=

$(Btu-50S)/[100-(1.08A+0.55S)]\times 100$ where:

Mm=mineral matter

Btu=British thermal units per pound (calorific value)

A=percentage of ash, and

S=percentage of sulfur

"Moist" refers to coal containing its natural inherent or bed moisture, but not including water adhering to the surface of the coal.

Reclaimed coal means coal recovered from a deposit that is not in its original geological location. Examples of these deposits are refuse piles or culm banks; refuse, culm or retaining dams and ponds that are or have been used during the mining or preparation process; and stream coal deposits.

Surface coal mining means the extraction of coal from the earth by removing the materials over the coal seam before recovering the coal and includes auger coal mining.

Ton means 2,000 pounds avoirdupois (0.90718 metric ton).

Underground coal mining means the extraction of coal from the earth by developing entries from the surface to the coal seam before recovering the coal by underground extraction methods and includes in situ mining.

Value means gross value at the time of initial bona fide sale, transfer of ownership, or use by the operator, but does not include the reclamation fee required by this part.

§ 837.11 Applicability.

The regulations in this Chapter apply to all surface coal mining and reclamation operations except—

(a) The extraction of coal by a landowner for his own non-commercial use from land owned or leased by him;

(b) The extraction of coal for commercial purposes by surface mining which affects two acres or less during the life of the mine;

(c) The extraction of coal as an incidental part of Federal, State, or local government-financed highway or other construction; and

(d) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the mineral tonnage removed for commercial use or sale.

§ 837.12 Reclamation fee.

(a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining.

(b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.

(c) If the operator combines surface mined coal, including reclaimed coal, with underground mined coal before the coal is weighed for fee purposes, the higher reclamation fee shall apply, unless he can substantiate the amount of coal produced by each mining method by acceptable engineering calculations or other reports which the Director may require.

(d) In computing the tons of coal produced for reclamation fee purposes in the fourth calendar quarter of 1977, the operator may deduct the tons of coal immedi-

ately available for sale, transfer, or use on September 30, 1977, from that coal sold, transferred or used during the fourth calendar quarter of 1977. If the operator makes this deduction, he shall attach to his fourth quarter, 1977, OSM form 837-1, a sworn and notarized statement of the amount of coal immediately available for sale, transfer or use on September 30, 1977, and the quantity of such coal produced by surface and underground mining respectively.

§ 837.13 Fee computations.

(a) *Surface mining fees.* The fee for anthracite, bituminous, and subbituminous coal, including reclaimed coal, is 35 cents per ton unless the value of such coal is less than $3.50 per ton, in which case the fee is 10 percent of the value.

(1) If the value of a ton of coal is equal to or greater than $3.50 per ton, multiply the number of tons produced in the calendar quarter by $0.35. Example: If the tonnage is 1,000, then 1,000 tons×$0.35=$350, which is the fee.

(2) If the value of a ton of coal is less than $3.50 per ton, multiply the value of a ton of coal by the total number of tons produced in the calendar quarter by 0.1. Example: If the value of a ton of coal is $2 and the tonnage is 1,000, then $2×1,000 tons×0.1=$200.

(b) *Underground mining fees.* The fee for anthracite, bituminous, and subbituminous coal is 15 cents per ton unless the value of such coal is less than $1.50 per ton, in which case the fee is 10 percent of the value.

(1) If the value of a ton of coal is equal to or greater than $1.50 per ton, multiply the number of tons produced in the calendar quarter by $0.15. Example: If the tonnage is 1,000, then 1,000 tons×$0.15=$150, which is the fee.

(2) If the value of a ton of coal is less than $1.50 per ton, multiply the value of a ton of coal by the total number of tons produced in the calendar quarter by 0.1. Example: If the value of a ton of coal is $1 and the tonnage is 1,000, then $1×1,000 tons ×0.1=$100, which is the fee.

(c) *Surface and underground mining fees for lignite coal.* The fee for lignite coal is 10 cents per ton unless the value of such coal is less than $5 per ton, in which case the fee charged is 2 percent of the value.

(1) If the value of a ton of lignite is equal to or greater than $5 per ton, multiply the number of tons produced in a calendar quarter by $0.10. Example: If the tonnage is 1,000, then 1,000 tons ×$0.10=$100, which is the fee.

(2) If the value of a ton of lignite is less than $5 per ton, multiply the value of a ton of lignite by the total number of tons produced in the calendar quarter by 0.02. Example: If the value is $4 and the tonnage is 1,000, then $4×1,000 tons×0.02=$80, which is the fee.

(d) *In situ coal mining fees.* The fee for in situ mined coal, except lignite coal, is 15 cents per ton based on Btu's per ton in place equated to the gas produced at the site. The fee for in situ mined lignite is 10 cents per ton based on the Btu's per ton of coal in place equated to the gas produced at the site. For example, if the Btu value of in situ coal is determined to be 23 million Btu's per ton, then for every 23 million Btu's of gas produced at the wellhead, one ton of coal will be deemed produced for the purposes of this part.

(1) The Btu value of a ton of in place coal shall be determined by analyses, certified by an independent laboratory, of the coal seam that is effected for potential Btu value of a ton of in place coal.

(2) For anthracite, bituminous, and subbituminous coal the fee shall be computed as follows: $F=(G/C)\times V_1$.

(3) For lignite coal the fee shall be computed as follows: $F=(G/L)\times V_2$.

(4) For the purposes of this paragraph:

F = Reclamation fee.

C = Million Btu's per ton of coal in place.

L = Million Btu's per ton of lignite in place.

G = Gas produced at the wellhead in million Btu's.

V_1 = \$0.15/ton equivalent; or if the value of a ton of coal equivalent is less than \$1.50, multiply the value by 0.1 and substitute the result for V_1 in the appropriate formula.

V_2 = \$0.10/ton equivalent, or if the value of a ton of lignite equivalent is less than \$5 multiply the value by 0.02 and substitute the result for V_2 in the appropriate formula.

§ 837.14 Determination of percentage based fees.

(a) If the operator submits a fee based on a percentage of the value of coal, he shall include with his fee and production report documentation supporting the alleged coal value. Based on this information and any additional documentation, including examination of the operator's books and records, that the Director may require, the Director may accept the valuation submitted by the operator, or may determine the value of the coal.

(b) If the Director determines that a higher fee shall be paid, the operator shall submit the additional fee plus statutory interest within thirty days of notification by the Director that an additional fee payment is due.

§ 837.15 Reclamation fee payment.

(a) Each operator shall pay the reclamation fee on a calendar quarter basis.

(b) The fee for the fourth calendar quarter of 1977 shall be paid no later than January 30, 1978.

(c) Each operator shall use OSM Form 837-1, Coal Production and Reclamation Fee Report form, for each quarterly payment period for each mine.

(d) The reclamation fee payment for each calendar quarter shall be paid no later than 30 calendar days after the end of the calendar quarter. Delinquent payments are subject to an interest charge at the statutory rate.

(e) The OSM Form 837-1 and check or money order for each coal mine or check or money order for all of the operator's mines represented by individually enclosed OSM Forms 837-1 shall be made payable to Director, Office of Surface Mining Reclamation and Enforcement and shall be sent in the same envelope to:

Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, P.O. Box 25065—DFC, Denver, Colo. 80225.

§ 837.16 Production records.

(a) Each operator shall maintain, on a current basis, books and records that contain at least the following information and data—

(1) Tons of coal sold or transferred, amount received per ton, name of party to whom sold or transferred, and the date of each sale or transfer.

(2) Tons of coal used by the operator and date of consumption.

(3) For in situ coal mining operations, total Btu value of gas produced, the Btu value of a ton of coal in place certified by an independent laboratory, and the amount received for gas sold, transferred or used.

(b) The fee compliance officer shall have access to the mine for the purpose of determining compliance with the regulations in this part.

(c) Each operator shall make any book or record necessary to substantiate the accuracy of reports and payments available at reasonable times for inspection and copying by the fee compliance officer. If the fee is paid at the maximum rate, the fee compliance officer shall not copy information relative to price. All information copied will be protected in accordance with the Freedom of Information Act.

(d) The operator shall maintain books and records for a period of 6 years from the end of the calendar quarter in which the fee was due.

[FR Doc. 77-35050 Filed 12-5-77; 2:30 pm]

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Knoxville, TN. 37902

Aug. 6, 1981

Memorandum

To: J. Steven Griles
Deputy Director

From: W. Hord Tipton /s/ W. Hord Tipton
Acting Regional Director, Region II

Subject: AML Fees—Moisture

In your July 31, 1981 inquiry you reference a "difference" in the method of calculating AML fees in Region II due to moisture. While we question whether there has been a standard policy respecting moisture adjustments from which to differ, it is true that such adjustments are handled differently in the State of Alabama than in other states in this Region.

The State of Alabama, acting through a policy letter signed by Ralph Eagerton, Jr., Commissioner of the Department of Revenue, has adopted a policy in severance tax collection which allows an adjustment for moisture content *in excess* of the moisture inherent in the coal beds of Alabama. This action by the State was undoubtedly prompted by a ruling by a U.S. District Court Judge in the case of *Harrison Combs, et al., Trustees; UMW Health & Retirement Fund v. Sun-Up Coal Co., Inc.*, Action No. CV-80-P-0236-J (closed August, 1980). The Judge in this case issued no written Order or Decision but it is apparent from the circumstances that he issued oral rulings respecting calculation of tonnages. This case appears to involve efforts by mineral holders and the UMW to obtain additional royalties. Sun-Up Coal was, and still is, following a policy of taking an adjustment

for excess moisture (in excess of inherent) which they claim is *added* in the mining and cleaning process. While the Judge's reasoning in this case is unavailable it is clear that Sun-Up paid no additional royalties and that the State issued the referenced policy statement.

The State of Alabama allows an adjustment for moisture in excess of 2.88% deemed inherent. Bureau of Mines Information Circular IC 868 1975, Table E-1, states an average bed moisture of 3.0% for Alabama coal seams. Reduced to the simplest terms the coal company argumen,t encountered uniformly throughout Alabama, is that taxation of excess moisture weights is an attempt to tax water not coal, and is not authorized by the Act.

Despite the fact that neither the Alabama policy nor the oral rulings of the U.S. District Court Judge are in any way binding on OSM and have no precedential value, the Region II Fee Compliance Branch Chief determined that such adjustments would not be questioned. My discussions with him indicate that his decision was based on the clearly evident willingness of several Alabama operators to litigate the issue of whether materials which are demonstrably not inherently present in coal were nonetheless subject to taxation under authority of a tax limited statutorily to *coal* production. The Fee Compliance Branch Chief in this Region is an attorney and made a judgment that in light of the fact of the Alabama policy, his perception of an extremely slim possibility that the Government could prevail in a court effort to prove that water was in fact coal, and in view of the wide-ranging ramifications of losing such a contest in a case having precedential value, the continued operation of the fee compliance program could best be served by allowing the deduction to operators in Alabama claiming *and supporting* such adjustments.

In addition, the Fee Compliance Chief brought this matter to the attention of the Field Solicitor. This matter was

forwarded to the attention of the Associate Solicitor on February 19, 1981 with a recommendation that the adjustments be allowed. There has not yet been an official response. However, by way of response the proposed preamble to the recently proposed regulations respecting AML fees seems to indicate such adjustments are not to be allowed. At such time as the preamble and regulations are published this Region will cease to allow these adjustments and will rely on the Solicitor to defend the litigation likely to follow.

Memorandum

To: Director

Through: William B. Schmidt
Assistant Director, Program Operations and Inspection

From: Phyllis Thompson
Chief, Branch of Fund Management

Subject: Request for Policy Decision—Excess Moisture Deduction by Drummond Coal Company

Required Decision:

Whether to allow Drummond Coal Company the "excess moisture" deduction in payment of reclamation fees. A policy decision is required to settle this question, since OSM regulations in this area have had varying interpretations and applications.

Forcing Event:

Inspector General's report on OSM's fee compliance activities, issued in March 1981. The Drummond Case is an "open" item which must be cleared.

Background:

The OSM fee compliance specialist who audits Alabama mines has been allowing an "excess moisture" deduction for any operator who requested such a deduction and presented a laboratory analysis to support it. Alabama regulations allow such a deduction for severance tax purposes. No other State (to our knowledge) allows a deduction for "excess moisture". Alabama operators justify such a deduction in this way: Mine Safety and Health Administration rules require that underground mines be "wet down" periodically to keep coal dust and gasses under control, thus adding "excess" moisture to mined coal, over and above "inherent" moisture, or the amount of water that occurs in "unwashed" coal. Operators

argue that since MSHA rules are responsible for the additional moisture (and thus additional weight), such weight should be exempt from the reclamation fee, *even if the "excess moisture" has not been removed before the initial sale of the coal.* Unfortunately, the Drummond case was selected during the Inspector General's audit as demonstrating OSM's inconsistency in application of its own regulations, CFR 30, 870.12(b):

> The fee shall be determined by the weight . . . at the time of initial bona fide sale, transfer of ownership, or use by the operator.

The IG is not insisting on any specific interpretation, only a decision so that this rule can be applied consistently until the rule changes.

In the preamble to the existing rule (published December 13, 1977), OSM answered a commenter who asked whether the fee must be paid on clean coal or run-of-mine coal:

> Sections 837.12(a) and (b) . . . specify . . . that the fee shall be determined *at the time of initial bona fide sale.* . . . For example, if the initial transaction is based on the weight of run-of-mine coal, then the reclamation fee must be paid for each ton of run-of-mine coal sold. . . . If the transaction is based on the weight of clean coal, then the reclamation fee must be paid on each ton of clean coal sold. . . .

That seems clear enough—one would have only to look at the sales receipt and note how many tons the seller was paid for, to determine the tonnage on which to compute the fee.

But what about the operator who sells run-of-mine coal, but is *paid* on a clean coal basis? For example, many small operators may deliver 100 tons of run-of-mine coal to a processing plant and be paid only for

95 tons. Payment of the 95 tons is accompanied by a laboratory analysis, showing that five percent of the delivered run-of-mine coal was calculated to be ash and dirt. Thus, the operator delivered 100 tons, but was *paid* only for 95 tons.

Should OSM, then, base the reclamation fee on 100 tons (delivered) or 95 tons (paid for)?

That question was answered in a Solicitor's opinion, dated April 17, 1980 (attached), which states:

> . . . the fee must be determined by the weight and value of the coal at the time of initial bona fide sale. More computations or estimations of the clean coal weight would not be in compliance. The coal would actually have to be cleaned prior to sale or use to meet the conditions in Section 837.12(b).

This opinion would seem to contradict the preamble which tells us to base the fee on the weight used in the initial transaction. Our hypothetical small operator was *paid* for 96 tons; however, the *weight* of the coal at the time of the sale was 100 tons.

In reality, fee compliance specialist's have applied the "weight" regulation in three different ways:

1. The fee has been based on *real* weight of the coal (either run-of-mine or cleaned) at the time of sale.
2. The fee has been based on the "calculated" reduced weight (supported by lab analysis), for which the operator was paid.
3. The fee has been based on the "calculated" reduced weight (supported by lab analysis), even when the operator was *not* paid on the basis of fewer tons.

Drummond fits into the third category. Drummond sells coal by the ton and gets paid more or less per ton, according to the BTU's per ton. If the coal has

more moisture, it has fewer BTU's *per ton*, and Drummond gets paid less per ton. (Note that Drummond does not get paid for *fewer* tons; they get paid less per ton.) Drummond is not the only company to be allowed this deduction; the IG report estimates that such a deduction reduced fees in Alabama by $304,811 over the 33-month period examined, and the FCO estimated that approximately 70 percent of the tonnage reported by operators in that State included an adjustment for excess moisture.

Options

Option No. 1:

OSM can allow this deduction for now and make it clear in the new regulation whether we will continue to allow it.

Pros:

1. This decision averts potential litigation. If we disallow the deduction for the quarters audited (4/77 through 4/80), Drummond will have to pay additional fees of $178,089 for that period, plus additional fees for the period not audited (from 1/81) until the proposed regulations are final (probably 6/82). That is probably enough money (so Drummond tells the FCO) to fight over. Drummond evidently feels they have a good case because:

   a) They know OSM has consistenty allowed this deduction to Alabama operators for the past four years.

   b) The State of Alabama allows the deduction when computing severance taxes.

   c) Drummond believes any judge would refuse to make them pay reclamation fees on water.

If we lost to Drummond in court, every operator who did not get such a deduction could clamor for a refund. If we won, we would have to go back to 70 percent of Alabama operators and reassess additional fees.

2. To allow this deduction maintains a kind of consistency in application of the regulations. So far as we can find out, OSM has never *disallowed* such a deduction; we simply never gave it to anyone who did not ask for it.

Cons:

1. Allowing this deduction for Drummond means that we have to keep allowing it, upon request, until the new regulations are final. That is a considerable loss of revenue for the fund, and we have no way of knowing how many additional operators may request it. We do know that the 70 percent in Alabama will continue to insist on the deduction until the new regulations are final, at an estimated loss to OSM of $9,000 per month. Also, there are rumblings that Kentucky operators are beginning to ask for it.

Option No. 2:

OSM can disallow the deduction for Drummond and bill them for $178,089, for the period audited.

Pros:

1. OSM could then refuse all such deductions and consistently apply the "weight" definition as the weight contained in the initial transaction, i.e., the tons paid for.

2. This decision will save at least $9,000 per month for the fund until the new regulations are final, more if OSM disallowed all such previous deductions and billed operators for additional fees.

Cons:

1. OSM would have to admit it has been inconsistent in application of the "weight" regulation.
2. It would be an administrative nightmare to try to collect more fees on the many "closed" audits where this deduction has been allowed.
3. OSM leaves itself open to litigation for applying this regulation arbitrarily and capriciously and thus violating Fifth Amendment rights to Due Process. (See attached comments from Bonekemper, pages 2 and 3, of February 22, 1982.)

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1057

In the Supreme Court of the United States

OCTOBER TERM, 1986

DRUMMOND COMPANY, INC., PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 402(a) of the Surface Mining Control and Reclamation Act of 1977, which requires coal mine operators to pay the Secretary of the Interior a fixed reclamation fee "per ton of coal produced," permits the Secretary to base this fee on the gross weight of the coal at the time of the initial sale, transfer, or use, without deductions for any impurities or water therein.

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In the Supreme Court of the United States

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No. 86-1057

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DONALD P. HODEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 796 F.2d 503. The opinion of the district court (Pet. App. 12a-42a) is reported at 610 F. Supp. 1489.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986. The order denying rehearing was entered on September 26, 1986 (Pet. App. 43a). The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). A provision of SMCRA, 30 U.S.C. 1231, established the

Abandoned Mine Reclamation Fund to be used to pay for the restoration of lands harmed by past coal mining activities. Coal operators subject to the Act are required to pay a reclamation fee of "35 cents per ton of coal produced by surface coal mining * * * [,] 15 cents per ton of coal produced by underground mining", and 10 cents per ton of lignite coal (30 U.S.C. 1232(a)). Congress, estimating the cost to reclaim abandoned mines at between $7 billion and $10 billion (H.R. Rep. 95-218, 95th Cong., 1st Sess. 134, 135 (1977)), found that "[t]he burden of paying for reclamation is rightfully assessed against the coal industry." *Id.* at 136.

In order to implement the reclamation program, the Secretary of the Interior promulgated national regulations on December 13, 1977, establishing the procedures to be used by coal mine operators in computing their reclamation fee liability. 42 Fed. Reg. 62715. The regulations, codified at 30 C.F.R. 870.12 (1978), originally provided for the payment of the reclamation fee "on each ton of coal produced for sale, transfer, or use" based on "the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." [1]

After he became aware of inconsistent interpretations of the regulations by local representatives of the Office of Surface Mining (OSM)—particularly in Alabama—and some confusion among coal mine operators as to how to calculate the "weight and value" of the coal, the Secretary

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[1] In the preamble to the 1977 regulations, addressing the question whether the reclamation fee would be paid on "run-of-mine" coal or "clean" coal, the Secretary stressed that the crucial factor was not the specific composition of the coal produced but, rather, the point in the mining operation at which the first sale or transfer occurred. 42 Fed. Reg. 62714. This interpretation of the 1977 regulation was repeated in an opinion of the Solicitor of the Office of Surface Mining, stating that (Pet. App. 27a):

> The fee must be determined by the weight and value of the coal at the time of initial bona fide sale.

proposed a clarifying regulation in December 1981. 46 Fed. Reg. 60778. The new regulation[2] added the following explanation to 30 C.F.R. 870.12(b) (emphasis in original):

> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> > (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

2. On August 27, 1982, the petitioner filed this action in the United States District Court for the District of Columbia, seeking review of the June 30, 1982, clarifying regulation.[3] The petitioner also filed a similar action in the United States District Court for the Northern District of Alabama. The instant action was stayed, on petitioner's motion, pending disposition of the action in the Alabama district court. The Alabama court upheld the Secretary's regulations on May 18, 1983 (Pet. App. 44a-50a), and petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals reversed (*id.* at 51a-64a), holding that, while it agreed with the district court's finding that the challenged regulations are valid, the district court lacked jurisdiction over the action. The court of appeals found that 30 U.S.C. 1276(a)(1) "require[s] that judicial review of regulations having nation-wide application occur in the federal district court in the District of Columbia" (Pet. App. 58a).[4]

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[2] The Secretary emphasized that the purpose of the revised regulation was "to clarify the point in time of fee determination as well as the value and weight parameters for calculating reclamation fees." 47 Fed. Reg. 28574, 28577 (1982). See note 1, *supra*.

[3] The statute provides that national regulations are subject to review in the United States District Court for the District of Columbia Circuit within 60 days of their promulgation (30 U.S.C. 1276(a)).

[4] See note 3, *supra*.

Following the decision of the Eleventh Circuit, petitioner and respondent filed motions for summary judgment in the instant action. The district court granted summary judgment in favor of the Secretary (Pet. App. 12a-42a), rejecting petitioner's argument that the Secretary had exceeded his authority in promulgating the challenged regulations (*id.* at 13a). The district court relied on the "well established" principle that " 'great deference [must be shown] to the interpretation given the statute by the officers or agency charged with its administration' " (*id.* at 23a (citations omitted)), noting that "[d]eference becomes all the more important when the interpretation of an administrative regulation is involved" (*ibid.*). The district court found that the 1982 regulations—which interpreted, but did not change prior policy (*id.* at 36a-41a)—are consistent with the language of the statute (*id.* at 25a-28a) and are "patently consistent with the legislative intent of the Act" (*id.* at 33a).

On appeal, petitioner again argued that the regulations exceed the Secretary's authority under Section 402(a) of SMCRA, 30 U.S.C. 1232(a), and violate the plain language of the statute and the legislative intent in enacting Section 402. Petitioner also took issue with the scope of review employed by the district court, asserting that no deference should be accorded the Secretary's interpretation given what the petitioner viewed as the plain meaning of the statutory language. The court of appeals affirmed (Pet. App. 1a-11a). Concluding that neither the statute nor the legislative history defined the term "coal produced" (*id.* at 5a-6a), the court of appeals found the Secretary's construction of the term to be a reasonable exercise of his broad rulemaking authority to fill the statutory "gap in the regulatory regime" (*id.* at 9a).[5]

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[5] It has been reported that the Secretary has decided to propose an amendment to the regulation to permit deduction of the weight of excess water before calculation of the reclamation fee (Inside Energy

ARGUMENT

The court of appeals correctly concluded that the regulation, requiring the reclamation fee on the weight of coal produced at the time of the first sale, transfer of ownership or use by the operator to be calculated with no deductions for impurities that have not then been removed, is entirely consistent with congressional intent in establishing the Abandoned Mine Reclamation Fund under SMCRA. Further review by this Court is not warranted at this time.

The petitioner bases its request for review on three grounds. First, petitioner asserts that under the "plain meaning" of the term "coal" the Secretary can assess reclamation fees on coal only after all impurities, including moisture, have been removed (Pet. 15). Second, petitioner urges review on the ground that there is a conflict between the District of Columbia Circuit and the Third Circuit as to the validity of the fee assessment regulation (*id.* at 15-21). Finally, petitioner asserts that the statutory analysis employed by the court of appeals requires correction by this Court (*id.* at 21-22).

1. Petitioner states that "Congress' analysis of the costs associated with payment of reclamation fees by the coal industry was predicated on the assumption, not articulated in the text of the statute but nevertheless apparent from the House Report on the final bill, that the substance to be taxed was in fact combustible coal and not extraneous materials found with it or absorbed by it during or after mining" (Pet. 3 (footnote omitted)). Petitioner's argument has no basis in the statute, its legislative history, or in the consistent interpretation of the relevant term by the Secretary.

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with Federal Lands, Feb. 9, 1987, at 1; Coal Outlook, Feb. 16, 1986, at 1; Coal News, No. 4862, Feb. 16, 1987). This is inaccurate. Although such a proposed amendment is under consideration, no decision has yet been made as to whether it will be proposed.

Petitioner notes (Pet. 5) that the Secretary's regulations define "coal" as "combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM [American Society for Testing and Materials] Standard D 388-77" (30 C.F.R. 700.5). Preceding the definitional section of the regulations, however, is the statement that "[a]s used throughout this chapter, the following terms have the specified meaning *except where otherwise indicated*" (emphasis added). Thus, the Secretary is free to "otherwise indicate" a reasonable different meaning for the term "coal" in other circumstances, as in Section 870.12(b)(3)(i).

In any event, the term "coal" is not used independently in the relevant section of the statute or its implementing regulation. The term employed in 30 U.S.C. 1232(a), the reclamation fee section of the statute, is "coal produced." Both courts below found that this statutory term is ambiguous. "Production could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction. * * * [N]owhere does the [SMCRA] specify what elements comprise a 'taxable' piece of coal" (Pet. App. 5a-6a (quoting district court at Pet. App. 25a-26a)). There is nothing unreasonable or "counterintuitive" (Pet. 13) about the Secretary's resolution of this ambiguity. Indeed, as the court of appeals noted, the record here shows that "the vast majority of U.S. coal operators, as well as OSM personnel outside of Alabama, interpreted the phrase 'coal produced' as do the revised regulations" (Pet. App. 6a).

The legislative history of the Act "does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations" (Pet. App. 6a). Because neither the statute nor its history defines the term "coal produced," the Secretary's interpretation must be upheld if found to be consistent with legislative intent.

In enacting the Abandoned Mine Reclamation Fund provision of SMCRA, Congress expressed its concern with

the costs of "widespread environmental degradation associated with coal surface mining" (H.R. Rep. 93-1072, 93d Cong., 2d Sess. 116 (1974)), costs which, until then, had been unfairly borne by the local residents of the mined areas where states had not accepted responsibility for rehabilitating the sites of abandoned mines. Congress was aware of the need to generate sufficient funds to reclaim abandoned mines, a cost estimated at between $7 billion and $10 billion. H.R. Rep. 95-218, 95th Cong., 1st Sess. 135 (1977). The petitioner, in emphasizing "the economic harm imposed by the Secretary's regulations" on the industry (Pet. 14), ignores the countervailing concern of Congress that attention be paid to

> the protection of health or safety of the public; protection of the environment from continued degradation and conservation of land and water resources; the protection or enhancement of public facilities as part of reclamation of land and water conservation projects; the improvement of lands and waters to a suitable condition useful in economic social development; and research and demonstration relating to the development of surface mining reclamation and water quality control program methods.

H.R. Rep. 95-218, *supra*, at 169.

Congress was aware of the potential economic impact on the coal mining industry and addressed that concern by establishing three different flat tax rates per ton of coal produced, depending on the type of coal (30 U.S.C. 1232(a)). That Congress intended to create these three categories and no others is shown by the congressional rejection of suggestions that the tax be based on BTU or energy value of the coal produced (H.R. Rep. 93-1072, *supra,* at 116-117) or that deductions be permitted for excess moisture (120 Cong. Rec. H-25230 (1974)), precisely the deduction that petitioner seeks to have the Secretary establish by interpretation.[6]

[6] The legislative history on which petitioner relies (Pet. 3 n.2) is at best ambiguous. H.R. Rep. 95-218, *supra,* at 137 notes that the

The district court, in upholding the regulation, found that a tax based on gross weight as of a given time, instead of one based on the purity of the mined coal, was clearly consistent with congressional intent (Pet. App. 30a-31a): it was easily enforceable, avoiding the need to test the coal for particular impurities; it did not require the Secretary to choose among impurities, whether inherent, such as moisture, ash and sulfur, or extrinsic, such as dirt and clay, in order to define "the 'true' elements of 'pure' coal" (*id.* at 31a); and finally, it provided an equitable national standard.

2. Petitioner also urges review on the ground that there is a conflict between the District of Columbia Circuit decision in this case and the Third Circuit decision in *United States* v. *Brook Contracting Corp.*, 759 F.2d 320 (1985). But the current position of the Third Circuit is unclear. In *United States* v. *Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir. 1984), the court found that anthracite silt was "coal" and therefore subject to reclamation fees. The court expressly affirmed "the Secretary's position that the noncombustible portion of the silt was properly included in calculating the weight upon which the reclamation fee was imposed." Pet. App. 71a; 747 F.2d at 899. In *Brook Contracting* (Pet. App. 65a-79a), however, a different panel of the Third Circuit disallowed the government's assessment of fees on the coal produced prior to first sale, stating that "as a matter of law * * * 'coal produced by surface coal

---

reclamation fee may be reduced based on the "value of coal at the mine after extraction," thus implying that the fee is to be based on the rough ore, at the point of extraction, and in the condition in which it is at that time—i.e., that the coal is "produced" at that point. The other reference (*id.* at 149) discusses the relatively small contribution of the reclamation fee to the cost of coal, and defines the reclamation fee as one of the "production costs." This scarcely requires petitioner's conclusion that the fee must be based on the value of "clean coal"—that it cannot be considered to be "produced" until it is ready for consumption.

mining' means combustible coal that would qualify as such under ASTM standards and excludes the weight of rock, clay, dirt and other debris" (*id.* at 79a).[7] The Third Circuit has been asked to reconcile these different interpretations of the regulation at issue here in *United States* v. *Warren Troup,* No. 86-1409 (argued Jan. 21, 1987). In that case, as in *Devil's Hole,* there was expert testimony that the aggregate is combustible enough to qualify as coal under ASTM standards, but the district court, relying on *Brook Contracting,* nevertheless disapproved of the calculation of the fee based on the weight of the aggregate at the point of first sale.[8] Significantly, the court of appeals in *Troup* has informed the parties that it will withhold action on the appeal until this Court has acted on the instant petition (App. A, *infra*), thus indicating its reluctance to accept the *Brook Contracting* analysis.

We submit that the Third Circuit should be permitted to resolve the conflict within that circuit in the first instance. In resolving that conflict, the *Troup* court may well bring the Third Circuit into agreement with the District of Columbia's position in the instant case, thus eliminating the conflict which petitioner asks this Court to resolve. If, on the other hand, the *Troup* court should disagree with the

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[7] The *Brook Contracting* court distinguished *Devil's Hole* on the ground that there "the district court's finding that anthracite silt was 'coal' * * * was supported in the record by expert testimony and other evidence that anthracite silt was combustible and qualified as 'coal' " under ASTM standards (Pet. App. 71a).

[8] In *Troup,* the government also argued on appeal that the courts in the Third Circuit are without jurisdiction to consider the validity of the national regulations implementing SMCRA, in light of 30 U.S.C. 1276(a)(1). See note 3, *supra.* That interpretation of the statute was rejected in *Holmes Limestone Co.* v. *Andrus,* 655 F.2d 732 (6th Cir. 1981), cert. denied, 456 U.S. 995 (1982), but subsequently accepted in *Virginia* v. *Clark,* 741 F.2d 37 (4th Cir. 1984), cert. granted, 469 U.S. 979 (1984), dismissed by stipulation, 469 U.S. 1198 (1985), and by the Eleventh Circuit in this case (see page 3, *supra*).

decision of the court of appeals in the instant case, a petition for a writ of certiorari in *Troup,* raising both the jurisdictional issue (see note 8, *supra*) and the definitional issue, may be appropriate.

3. Finally, petitioner asserts that the decision below "violated fundamental precepts of statutory construction" in ignoring congressional intent (Pet. 21). Petitioner correctly notes (*id.* at 21-22) that both the agency and the reviewing court must "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984)). But petitioner ignores the context in which the quoted language occurs. The agency interpretation may be ignored only when "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter" (467 U.S. at 842). The *Chevron* Court went on to emphasize that when "Congress has not directly addressed the precise question at issue, * * * the question for the court is whether the agency's [regulation] is based on a permissible construction of the statute" (*id.* at 843). The court of appeals correctly concluded that the instant case is governed by the latter principle; Congress did not address the precise issue of whether the reclamation fee was to be based on clean coal, and its use of the term "coal produced" is inherently ambiguous. Accordingly, as *Chevron* directs, the court below considered whether the agency's "view that [the regulation] is appropriate in the context of [the] particular program is a reasonable one" (*id.* at 845). Here, as in *Chevron,* affirmance of the agency interpretation followed from the conclusion that it reflected "a reasonable policy choice for the agency to make" (*ibid.*).

Far from being "misguided," as petitioner contends (Pet. 21), the court of appeals simply followed customary principles of statutory construction, rejecting "crabbed interpretations" of agency rulemaking powers (*In re Per-*

manent Surface Mining Regulation Litigation, 653 F.2d 514, 525 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981)), and properly accorded "considerable weight * * * to [the] executive department's construction of a statutory scheme it is entrusted to administer," *Chevron,* 467 U.S. at 844 (footnote omitted); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980). In a similar context, the court of appeals correctly noted that such deference "is particularly appropriate when a complex regulatory statute emerges from a process of difficult legislative gestation" (*In re Permanent Surface Mining Regulation,* 653 F.2d at 522). There is no need for this Court to review the application of these established principles in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1987

APPENDIX

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Re: United States of America, Appellant vs. Troup, Warren, doing business as Warren Troup Coal Co., *No. 86-1409.*

Dear Counsel:

The Court wishes to advise counsel that it will withhold decision in the above case, which counsel argued on Wednesday, January 21, 1987, pending action by the Supreme Court on the petition for writ of certiorari (No. 86-1057) to the Court of Appeals for the District of Columbia Circuit in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986). Counsel are requested to apprise this Court of any relevant developments in that case.

Very truly yours,

SALLY MRVOS, Clerk

By: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

MEF

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No. 86-1057

(4)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL, SECRETARY
DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1986

No. 86-1057

DRUMMOND COMPANY, INC.,
Petitioner,

v.

DONALD P. HODEL, SECRETARY
DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amici National Coal Association and Mining and Reclamation Council of America respectfully submit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered herein on July 22, 1986 in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986), should be granted.

Both Petitioner and Respondent in this case have consented to National Coal Association and the Mining and Reclamation Council of America filing this brief as *amici curiae.* The consents have been filed with the Clerk.

INTEREST OF AMICI NATIONAL COAL ASSOCIATION AND THE MINING AND RECLAMATION COUNCIL OF AMERICA

The National Coal Association ("NCA") and the Mining and Reclamation Council of America ("MARC") are associations with hundreds of members, including coal producers, coal sellers, and thirty-two state and regional associations. NCA and MARC, through their membership and affiliated associations, represent over ninety percent of U.S. coal production and NCA and MARC producer members have mining operations in Eastern, Midwestern, and Western states. NCA and MARC producer members range from companies mining several thousand tons of coal yearly to large corporations producing millions of tons of coal annually.

At issue in this case are revised regulations promulgated in 1982[1] by the Secretary of the Interior ("Secretary") governing the imposition and collection of reclamation fees under the Surface Mining Control and Reclamation Act ("SMCRA" or "the Act"), 30 U.S.C. § 1201-1328 (1982), which authorize the imposition of reclamation fees on each "ton of coal produced," by interpreting "coal" to include, among other things, water that is not an inherent part of coal ("excess moisture").

NCA and MARC are filing this *Amicus* Brief because of their concern over the adverse effects on their members of these revised regulations which are extracting excessive funds from coal operators, *nationwide*. As the Eleventh Circuit has found, these regulations are national in their application. *Drummond Coal Co. v. Watt*, 735 F.2d 469, 471 (11th Cir. 1984). Title IV of SMCRA created the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1231 (1982), and enacted a requirement that *all* coal operators subject to the statute pay into the fund on every ton of *coal* produced. 30 U.S.C. § 1232 (1982). Except for certain very limited exceptions, the revised regulations state that the fee collection procedures "apply to *all* surface and underground

[1]Revision of the Abandoned Mine Land Reclamation Program Rules, 47 Fed. Reg. 28,574, 28,594 (1982), codified at 30 C.F.R. § 870.12 (1985).

coal mining operations . . . ."30 C.F.R. § 870.11 (1985). (Emphasis added.)

Although this case focuses on Alabama producers, a decision in this case affects all coal producers and derivatively, the entire coal industry. This is because, although some coal producers have taken deductions for excess moisture, the others, according to the Government[2] are making payments into the Abandoned Mine Reclamation Fund based on excess moisture – payments which, NCA and MARC believe are excessive, unwarranted and the demand for which, by the Government, is illegal under the law.

Small producers may be particularly vulnerable to this unwarranted fee because the size of their mining operations make the installation of processing facilities to remove excess moisture uneconomical. MARC, in objecting to the challenged section of the revised regulations, stated to the Department of the Interior ("DOI" or "the Department") that, generally, "the price the small operators receive for their coal is adjusted downward to account for moisture and impurities. However, according to these proposed regulations, they must pay $.35 per ton for not only the coal, but for the impurities as well." Administrative Record at 67. MARC continued: "[t]his means not only are they receiving less for their coal but are paying higher taxes. . . ." *Id.*

NCA, through the Joint NCA/AMC Committee on Surface Mining Regulations, also specifically filed objections on a legal and technical basis to the challenged section of the revised regulations stating, in summary, that the challenged section was "inconsistent with the plain language of Section 401(a) of the SMCRA, Congressional intent in establishing that section of the statute, and administrative good sense." Administrative Record at 160.

In sum, therefore, NCA and MARC believe they have a vital interest, in this case, in protecting the interests of their members, *nationwide*.

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[2]Affidavit of Jane E. Robinson, Secretary's Record Supplement Exhibit D at 2-3.

ARGUMENT

I. The Coal Industry Never Considered That Water Should Be Part Of Coal For Purposes Of Calculating Reclamation Fees

The coal industry has opposed the DOI attempt to tax "excess moisture" from the time the revised regulations were proposed, in part, because the proposal was based on a flawed premise, namely that impurities, not inherent to the coal, not removed by a time certain should be deemed part of the gross weight of the coal.

A. Under common industry practice, "coal" includes inherent moisture but not excess moisture.

1. Inherent Moisture

Four basic characteristics – (1) Btu value; (2) sulfur; (3) ash; and (4) moisture – are consistently analyzed whenever coal is bought and sold. These characteristics affect price and use and no coal contract, however simple, would fail to address them. While these basic characteristics vary as widely as do the coal seams throughout the United States, the inherent quality of coal within each coal seam can be analyzed and precisely defined.

It is important to know the inherent quality of the coal in any given seam prior to mining, particularly since most coal is mined and sold under long-term contract and an overriding complicating factor is the occurrence of the unexpected. Moreover, boiler specifications are matched to coal specifications and if the coal quality, and particularly if inherent moisture proves inaccurate, it can severely affect boiler efficiency. For this reason, premiums and penalties are often inserted into contracts with respect to the inherent quality specifications.

Thus, measuring inherent moisture in the coal is not mere guesswork. It is a most important commercial factor involved in the sale and the burning of coal. It is dealt with accordingly by those who produce and those who buy coal.

2. Excess Moisture

The inherent characteristics of coal do not change from the time the coal is mined until it is burned – unless it is treated by preparation. However, most coal is exposed to water after mining and before burning and such water is commonly referred to in the coal industry as excess moisture. In a surface mine, exposure is from rainfall; in underground mines, most of which are naturally damp, additional exposure is caused by spraying coal to reduce dust levels. Excess moisture will increase for all coal during storage at the mine, during transport, and in storage at the user's site. (An exception to this may be where the coal is mined in the arid regions of the West.) The percentage increase of this kind of moisture is a function of the amount of exposure of the coal after mining to water. The amount that excess moisture contributes to the total weight of the coal is, to an extent, uncontrollable. Inherent moisture is an "impurity" integral to the fuel itself, which along with the other chemical properties constitutes "coal." Excess moisture is water that the coal is exposed to after mining. The accepted historical practice by coal operators and utilities is that coal operators are not compensated for excess moisture as part of the coal delivered to customers. The challenged section of the revised regulations ignores this common industry practice.

B. The coal industry pointed out to DOI the flawed nature of the excess moisture regulations when proposed

The Joint NCA/AMC Committee on Surface Mining Regulations ("Joint Committee") is comprised of over 180 technical, legal and financial industry experts representing coal company members of both the National Coal Association and the American Mining Congress as well as representatives from many of the state coal associations and other coal companies. The Joint Committee has technical expertise in various fields impacting on surface coal mining and reclamation including hydrology, climatology, agronomy, geology and archeology.

NCA, through the Joint Committee in its comments on the challenged section of the revised regulations pointed out to DOI's Office of Surface Mining ("OSM"), in 1982, the reasons why from the practical realities of surface coal mining and SMCRA's legislative scheme, excess moisture should not be taxed:

> Coal when extracted from the ground whether by surface or underground mining contains a number of constituents including moisture. This "inherent" or bed moisture, which adds to the weight of coal, will vary from seam to seam and may in fact vary within a single seam. After extraction, of course, coal is exposed to water from puddles in the mine or the strip pit, or from rain or, in the case of washed coal, complete immersion in water in the preparation plant. As a result, water is added to the coal in excess of the moisture it naturally contains at the time of severance in an underground or surface mine. This excess moisture adds to the weight of the coal but not its value.
>
> . . .
>
> In SMCRA, section 401(a)'s reference to basing the fee on the "value of the *coal* at the mine" indicates that Congress recognized that materials such as dirt, rock, ash and minerals that were extracted with the coal but were removed prior to sale should not be included in calculating the fee. These materials add no "value" to the coal. It is totally inconsistent with this scheme to impose a fee on water which has been added to the coal after it has been severed and which clearly does not add to the value of the coal. It is important to note that nothing in the legislative history contradicts this interpretation of section 401(a) or supports OSM's proposal to require excess moisture to be included in calculating the weight of the coal.

Administrative Record at 160, 162.

NCA and MARC strongly believe the Secretary missed or simply disregarded the central issues involving this regulatory change.

In 1982 NCA, through the Joint Committee, discussed the fact that OSM regulations in effect at the time did not require "this excess moisture be included when operators determine the weight of coal for purposes of calculating the Section 401(a) reclamation fee." Administrative Record at 161. NCA made the point, repeatedly, in those comments, that the "notice accompanying the December 11 proposals provides no explanation concerning the rationale behind this proposed change." *Id.* NCA suggested several alternatives to the proposed change but DOI rejected these alternatives, and DOI in the Preamble to the final regulations, in fact, did not reasonably substantiate either the rejection or the final rule. 47 Fed. Reg. 28,577-78 (1982).

II. Except To The Extent That Deductions For Excess Moisture Have Been Allowed, The Revised Regulations Improperly Extract Excessive Funds From All Coal Operators Paying On Excess Moisture, Violating The Balance of "Considerations" Set Forth In SMCRA

SMCRA does not allow for an expansive reading of the Secretary's power to assess reclamation fees such that he could redefine coal to include non-combustible materials. A review of the legislative history clearly shows that Congress never intended such an expansive reading and to the extent that operators, *nationwide,* already are paying on excessive moisture, or would pay in the future, the government is extracting unwarranted and excessive funds from such operators which rightfully belong to the operators.

This is a very significant fact under SMCRA. *Reflecting three congressional concerns, Congress set the fee at a level that would not burden industry, would provide sufficient funds for meeting program objectives within a reasonable timeframe and would be structured so it would not exert an inflationary in-*

fluence on the economy. H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S. Code Cong. & Ad. News 669.

The District Court for the District of Columbia chose, however, to emphasize as "the focus of Congress' concern" the "remedial purposes of the Fund" and the court-stated purpose of "the need to rehabilitate those regions unable to absorb costs associated with surface mining." *Drummond Coal Co. v. Hodel,* 610 F. Supp. 1489, 1501 n.9 (D.D.C. 1985).

The D.C. Court of Appeals, in affirming the District Court, took a slightly different tack, recognizing that the "House Report reflects general concern, in connection with the level of the reclamation fee to be assessed, with the burden placed on the industry and consumers and with the inflationary impact of the fee" but saying that those "considerations were explicitly balanced, however, against the need to raise sufficient funds to meet program objectives." *Drummond Coal Co. v. Hodel,* 796 F.2d 503, 506 (D.C. Cir. 1986.) Finally, the Court of Appeals said: "[i]n any event, we fail to see how the general policy concerns relating to the impact on industry and consumers – even standing alone – could be dispositive of the issue before us." *Id.*

It is interesting that in emphasizing sufficient funding as a basis for allowing the rulemaking the District Court and Court of Appeals choose to ignore two facts: (1) that Congress, in enacting SMCRA, estimated how much Congress thought the reclamation fee would yield (and which was thus at least acceptable to Congress); and (2) that OSM, itself recognized this in its "Determination of Effects of Rules," when OSM stated: "[i]n 1977 Congress estimated that the reclamation fee imposed by Title IV would yield approximately $140-160 million per year *nationwide.* Current collections by OSM place that total around $200 million." Administrative Record at 34. (Emphasis added.) In fact, in fiscal year 1985 alone, the Secretary of the Interior collected over $226 million in reclamation fees from coal operators throughout the country.

It may not be surprising that collections are higher than Con-

gressional projections since Congress never intended that rock, clay, dirt, other debris or excess moisture be taxed and that is precisely the point that the D.C. Circuit failed to see. Moreover, a primary point made by Drummond, NCA and MARC has been that DOI never demonstrated that the "remedial purposes" of the Act would be undercut or that there would not be "sufficient funds for meeting program objectives within a reasonable timeframe." *DOI has only alleged that collections would be reduced.*[3]

This allegation by DOI seemingly accepted on its face as persuasive by the D.C. District Court and Court of Appeals, is completely inadequate in the face of Congressional concerns about economic burdens to the economy in general and the coal industry in particular.

Although the economic burden of this unwarranted tax on "excess moisture" varies on each operator throughout the country, the burden is a real one and is being imposed at a time when the coal industry is particularly vulnerable to cost pressures, including those that could result from unwarranted taxes. As Price Waterhouse recently pointed out in a major study of the coal industry conducted for, but not controlled by NCA, "the once characteristic rapid growth of the coal industry has slowed to a modest 1.8 percent annual rate over the past 5 years." Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report 3* (Sept. 1985). Price Waterhouse further pointed out that:

> Competitive pressures from alternative fuels, primarily oil and gas, have resulted in significant productivity increases *and a slow decline in the real price of coal.* During the period from 1978 to 1983 productivity rose 41 percent, reflecting results from more efficient mining techniques and heavy capital investment in more efficient production equipment.

---

[3]See unsupported allegation in the Preamble to the Final 1982 Rules that if moisture deductions were allowed, "such deductions could reduce fee collections by many millions of dollars *over the 15-year life of the Fund."* 47 Fed. Reg. 28,578 (1982). (Emphasis added.)

> Employment, however, fell dramatically over the same time period . . . from 224,203 in 1979 to 173,543 in 1983. Current employment is estimated to be approximately 175,000 . . . .
>
> International competitive pressures are also playing a major role in the domestic coal market. . . . In four years, total tonnage of coal exported from the United States dropped nearly 28 percent. *Id.* (Emphasis added.)

Clearly, Congressional concern over additional economic burdens was merited. To impose an unjustified and illegal tax on coal operators, *nationwide*, is to impose precisely the kind of unwarranted burden about which Congress was so concerned.

CONCLUSION

To avoid continuing a nationwide burden which flies in the plain face of the statute and explicit Congressional intent, and effect the clear balance among the various Congressional interests set forth in SMCRA, the National Coal Association and the Mining and Reclamation Council of America respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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No. 86-1057

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,
v.

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE PETITIONER

In its petition, Drummond Company, Inc. (hereinafter Petitioner) seeks review of a decision by the District of Columbia Circuit that upheld regulations promulgated by the Secretary of the Interior pursuant to § 402(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232(a), which, contrary to the plain meaning of that Act, impose reclamation fees on water added to coal after it is mined and other materials that do not constitute "coal." Drummond demonstrated that this is an issue of national significance [1]

[1] As Drummond noted in its petition, the question whether the term coal includes excess moisture has significance beyond the reclamation fee program administered under SMCRA. On August 11, 1986, the Internal Revenue Service adopted Revenue Ruling

and that there is a clear split between the District of Columbia and the Third Circuits over the legality of the Secretary's regulations.

In its response, the Government claims that the court below acted properly because the SMCRA permits the Secretary to assess fees on "coal produced," a term that it argues is vague and thus susceptible to agency interpretation. According to the Government, the Secretary may assess reclamation fees not only on coal but also on water and other non-coal materials. But as Drummond demonstrated in its petition, the Government and the court below have missed the crucial point. As we have shown, even if there is ambiguity as to when and where coal is deemed "produced," the Secretary clearly is limited by SMCRA to assessing fees on "coal."

A. THERE IS A CLEAR SPLIT BETWEEN THE CIRCUITS

The Government does not deny that the decision below cannot be reconciled with the Third Circuit's decision in *United States v. Brook Contracting Corp.*, 759 F.2d 320 (3d Cir. 1985). In *Brook*, the court found that as a matter of law "coal" produced by surface coal mining means combustible coal that could qualify as such under ASTM standards[2] and that the Secretary's regulations were invalid to the extent that they assessed fees on materials other than combustible coal. Pet. App. 78a. In its ruling below, the District of Columbia Circuit upheld the identical regulations at issue in *Brook*.

86-96, 1986-32 I.R.B. 5, which implements the Eleventh Circuit's opinion in A.J. Taft Coal Co., Inc. v. United States, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985), authorizing deduction of excess moisture for purposes of calculating payments to the Black Lung tax fund. A copy of the IRS Revenue Ruling is appended to this Reply. App. 1a.

[2] American Society for Testing and Materials (ASTM) Standard D388-77.

The Government now argues that this Court should deny *certiorari* in order to permit the Third Circuit to resolve a supposed conflict between the Third Circuit's decisions in *United States v. Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir. 1984), and *Brook* in a manner that "may well bring the Third Circuit into agreement with the D.C. Circuit's position" in *Drummond*.[3] But there is no basis for the Government's speculation that a decision by the Third Circuit in *United States v. Troup*, No. 86-1409 (argued Jan. 21, 1987), would resolve the direct conflict between the District of Columbia and Third Circuits concerning the validity of the rule at issue in this case. Instead, there is every reason to believe that a Third Circuit decision in *Troup* will be consistent with that circuit's earlier decisions in *Brook* and *Devil's Hole*.

The district court's decision in *United States v. Troup*, Civil Action No. 84-6079, bench opinion,[4] demonstrates that *Devil's Hole* and *Troup* are both consistent with *Brook* and that therefore rejection of *Brook* is unlikely to occur on appeal. As the district court explained in its opinion in *Troup*, which is now before the Third Circuit, decisions of the different panels in the *Devil's Hole* and *Brook* cases are in fact "reconcilable." App. 5a.

The factual question before the two panels in *Devil's Hole* and in *Brook* was whether all the material produced by the coal operators was coal on which a fee might be assessed. In *Devil's Hole*, the Third Circuit concluded, based on expert testimony, that the anthracite silt at issue there was coal, and thus subject to the reclamation fee. In *Brook* there was no expert evidence that the material at issue was coal, Pet. App. 71a, and therefore the panel, completely consistent with *Devil's Hole*, held that the material was not subject to the reclamation fee.

---

[3] Brief for Respondent in Opposition 9.

[4] A copy of the unreported bench opinion (transcript dated April 25, 1986, 184-188) is appended to this reply. App. 2a.

Finally, in *Troup*, the district court held that some of the material at issue there was combustible material subject to the reclamation fee, while other material was not coal and therefore not subject to the fee.[5]

Rather than underscoring a split within the Third Circuit, the *Troup* case highlights the difference in the approach taken by the Third Circuit—which focused on whether OSM could legally assess fees on material other than coal—and that taken by the District of Columbia Circuit—which focused on whether ambiguities in the term "coal produced" authorized the Secretary to interpret the Act to impose fees on material other than coal.

B. THE SPLIT BETWEEN THE CIRCUITS WILL REMAIN UNTIL THIS COURT RESOLVES IT

The Government's argument that this Court should deny the petition for *certiorari* so that the Third Circuit can "resolve the conflict within that circuit", and its assertion that the *Troup* court "may well bring the Third Circuit into agreement with the District of Columbia's position in the instant case" is gross speculation and wishful thinking. As we have demonstrated above, and as the district court noted in *Troup*, that case, *Brook*, and *Devil's Hole* are all easily reconcilable. The Government's further assertion that the Third Circuit's letter to the parties in *Troup*, which indicates that it will withhold action on the appeal of that case until this Court has acted, demonstrates the Third Circuit's "reluctance to accept the *Brook Contracting* analysis" is outrageous and totally unsupported.

---

[5] The Government's claim that the court in *Troup* held that the material at issue there was "combustible enough to qualify as coal" but that it nonetheless disapproved of subjecting that material to the fee, Brief for Respondent in Oposition at 9, is inaccurate. As noted above, the *Troup* court held that the material that qualified as *coal* was properly subject to the reclamation fee. *See* App. 5a.

Finally, assuming, *arguendo*, that the Government is correct that the Third Circuit is without jurisdiction to consider the validity of SMCRA regulations, this petition is the only opportunity this Court is likely to have to resolve the conflict between the circuits. If the Third Circuit accepts the Government's jurisdictional argument, it will not address the merits of the Government's appeal. The Government is unlikely to seek *certiorari* of a Third Circuit dismissal of *Troup* on jurisdictional grounds.

CONCLUSION

For the reasons discussed in the petition for *certiorari* and set forth above, the petition for a writ of *certiorari* to review the opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case should be granted.

Respectfully submitted,

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March 17, 1987

APPENDIX

APPENDIX

APPENDIX

Section 4121.—Imposition of Tax

26 CFR 48.4121-1: Imposition and rate of tax on coal.

Coal; effect of moisture content on tonnage determination. The Service will allow a calculated reduction of the taxable weight of coal for the weight of excess moisture. Rev. Rul. 82-222 modified.

Rev. Rul. 86-96

Rev. Rul. 82-222, 1982-2 C.B. 295, holds that the federal excise tax imposed by section 4121 of the Internal Revenue Code on a producer's sale of coal applies to the full amount of coal sold by the producer. This amount was to be determined at the point of sale with no reduction for moisture content.

In *A.J. Taft Coal Co. v. U.S.*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 280 (11th Cir. 1985), the court held that, for purposes of section 4121 of the Code, the term "coal" does not include water that is in excess of the coal's inherent moisture content and that is reasonably measurable.

For purposes of the tax imposed by section 4121 of the Code, the Internal Revenue Service will follow the *Taft Coal Co.* decision regarding the moisture content of coal. The Service will allow a calculated reduction of the taxable weight of coal for the weight of excess moisture, but only where the taxpayer can demonstrate through competent evidence that there is a reasonable basis for its determination of the existence, and amount, of excess moisture.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 82-222 is modified.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-6079

UNITED STATES OF AMERICA,
Plaintiff

v.

WARREN TROUP,
Defendant

[Filed May 1, 1986]

CIVIL JUDGMENT ORDER

AND NOW, this 30 day of April, 1986, in accord with the bench opinion delivered by the Court at the close of trial held April 25, 1986, judgment is hereby entered in favor of the United States and against the defendant Warren Troup in the amount of $19,526.80.

BY THE COURT:

/s/ Ed. N. Cahn
EDWARD N. CAHN, J.

BENCH OPINION

Before the Court is the claim of the United States of America for a reclamation fee allegedly owed by the defendant, pursuant to 30 U.S.C., Section 1232 (a).

The Defendant is Warren Troup, T-R-O-U-P, who is an individual coal operator, from Ashland, Schuylkill County, Pennsylvania. Mr. Troup operates a surface coal mining business in Schuylkill County, whereby he uses a drag line to uncover pillars of coal left from abandoned uderground mines. Prior to removing the pillars of coal with the drag line, he causes blasts at the site to loosen the material.

The drag-line operator removes the spoils and places them on a separate pile. He attempts to excavate the pillars of coal and place that material on a "coal pile." While excavating the pillars of coal, rock, clay, dirt and other debris are included in the coal pile because the dragline operator is unable to eliminate that material and still reclaim the pillar of coal.

The controversy before me is highlighted by two opinions from the Court of Appeals of this Circuit. In United States versus Devil's Hole, Inc., 474 F 2d 895 (3rd Cir. 1984) Judge Gibbons held that silt sold to a public utility is subject to the reclamation fee even though the silt contained some non-combustible material. In United States versus Brook Contracting, 759 F 2nd 320 (3rd Cir. 1985), the Court of Appeals, strike that—Judge Aldisert held:

> "We therefore hold as a matter of law, that as used in the statute, "Coal produced by surface coal mining" means combustible coal that would qualify as such under ASTM Standards and excludes the weight of rock, clay, dirt and other debris in the computation of the reclamation fee.' "

In Brook, Judge Aldisert emphasized that there was no expert opinion as to whether or not the material sold

by the surface mining operator was or was not coal. In Devil's Hole a Dr. Davis testified that the silt—strike that—Dr. Davis testified that the anthracite silt is coal of anthracite rank. The government urges, therefore, that since Dr. Davis testified in this case that the material on Troup's "coal pile" was anthracite coal that the reclamation fee should be on the total tonnage Troup sold to his coal processor.

Troup, on the other hand, agrees that some reclamation fee is payable but that a subtraction must be made for "the weight or rock, clay, dirt and other debris."

The case is close and difficult. However, I think that the decision is mandated by Section 8 of Judge Aldisert's opinion in Brook. As I understand his opinion, the reclamation fee may be charged on material that: (a) is combustible; (b) that qualifies as coal under ASTM Standards; and (c) excludes the weight of rock, clay, dirt and other debris. Dr. Davis' testimony, which I accept as competent, accurate and credible, establishes that the material on the Troup coal pile is combustible and that it is defined as coal under ASTM standards. The testimony also shows that when this material is sent to the processing plant further refinement takes place whereby a process using a heavy medium is followed so that inorganic material is separated from the organic coal. This "sink and float" operation works on principles of specific gravity and the fact that the organic material is lighter than the inorganic material which sinks to the bottom of the heavy medium. Dr. Davis testified that there is inorganic material present in the purest forms of anthracite coal unless you use a dental pick to chip off very small pieces of pure organic anthracite. Consequently, the government argues that the exclusion of inorganic material from the calculus used to determine the amount of the reclamation fee should not be utilized. What the government is saying is that the exclusion ordered by the opinion of Judge Aldisert should be disre-

garded. I'm simply not in a position to disregard this directive.

It seems to me that the two opinions of the Court of Appeals are reconcilable. In Devil's Hole the reclamation fee was charged on silt which was purchased by the ultimate user. In that situation, the fact that the silt contained some inorganic material should not mean that a reduction in the reclamation fee is required for that inorganic material because the customer used all of the silt. In Brook and in the case at bar the coal processor eliminates the inorganic material before the coal is sold to the ultimate consumer. In my view, the liability of Troup as the first seller should be limited to the amount of coal that is commercially useable by the ultimate consumer. Therefore, I think that the decision that I'm making in this case is consistent with the two leading cases on this subject in this Circuit. The government is directed to prepare a judgment order for a reclamation fee in the amount of 55 percent of the fee calculated on Exhibit G-1 and submit an order to this Court on Monday, April 28, 1986. The 55 percent is arrived at by taking the percentages of recovery calculated by W. H. Morgan Coal Testing Laboratories and averaging it to 53 percent. The percentage is increased to 55 percent because as a matter of fact I find that there is the most likely percentage of useable coal on the Troup coal pile.

Now counsel I don't wish to debate this with you any further but if I made a slip of the tongue and we can correct it now I invite you to call it to my attention or if you notice anything in the opinion which you think is incorrect factually and from a check of my notes I would see that, I invite you to write me a letter with a copy to the other side and I'll consider what you say.

Is there anything further, gentlemen?

MR. KOPKO: I have nothing further. I thank you for this opportunity but simply for the record I move for the imposition of fees and costs on the government.

THE COURT: Motion is denied.
MR. KOPKO: Thank you, sir.
MR. ELLIS: Nothing further, your Honor.
THE COURT: All right. You may be excused. Have a pleasant weekend, gentlemen.
MR. ELLIS: Okay. Thanks, Judge.

(Court adjourned at 4:30 o'clock p.m.)